

TABLE OF CONTENTS

INTRODUCTION	1
BACKGROUND	1
I. State Court Proceedings.....	1
II. Federal Court Proceedings.....	4
LEGAL STANDARD.....	6
ARGUMENT	7
I. Plaintiffs’ right to relief is not indisputably clear.....	7
A. Plaintiffs lack standing to assert the claims underlying their Motion.....	8
B. Plaintiffs’ Elections Clause claims fail as a matter of law.....	10
1. The relief Plaintiffs seek is foreclosed by federal statute and Supreme Court precedent.....	10
2. Adopting Plaintiffs’ theory would lead to absurd results.	14
C. Plaintiffs’ equal population claim fails on the merits.	15
D. The Eleventh Amendment bars Plaintiffs’ claim that the Pennsylvania Supreme Court did not follow Pennsylvania’s “policies and preferences” in choosing a congressional map.....	18
II. Plaintiffs do not establish likely irreparable harm.....	19
III. Equity and the public interest weigh against an injunction.	20
CONCLUSION	21

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Abrams v. Johnson</i> , 521 U.S.	16, 18
<i>Adams v. Freedom Forge Corp.</i> , 204 F.3d 475 (3d Cir. 2000)	19
<i>Aposhian v. Barr</i> , 958 F.3d 969 (10th Cir. 2020)	19
<i>Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n</i> , 576 U.S. 787 (2015).....	11
<i>Balsam v. Sec’y of State</i> , 607 F. App’x 177 (3d Cir. 2015)	19
<i>Bognet v. Sec’y Commonwealth of Pa.</i> , 980 F.3d 336 (3d Cir. 2020), <i>cert. granted, judgment vacated as</i> <i>moot. Bognet v. Degraffenreid</i> , 141 S. Ct. 2508 (2021).....	8
<i>Branch v. Smith</i> , 538 U.S. 254 (2003).....	10, 11, 12, 14
<i>Colleton Cnty. Council v. McConnell</i> , 201 F. Supp. 2d 618 (D.S.C. 2002)	15
<i>Corman v. Torres</i> , 287 F. Supp. 3d 558 (M.D. Pa. 2018).....	9, 10
<i>DaimlerChrysler Corp. v. Cuno</i> , 547 U.S. 332 (2006).....	8
<i>Diaz v. Silver</i> , 932 F. Supp. 462 (E.D.N.Y. 1996)	13
<i>Essex v. Kobach</i> , 874 F. Supp. 2d 1069 (D. Kan. 2012).....	15

Gill v. Whitford,
138 S. Ct. 1916 (2018).....9

Grove v. Emison,
507 U.S. 25 (1993).....1, 10, 12, 14

Harper v. Hall,
No. 413P21 (N.C. Dec. 8, 2021).....13

Hu v. Att’y Gen. of U.S.,
219 F. App’x. 254 (3d Cir. 2007)8

Johnson v. Miller,
922 F. Supp. 1556 (S.D. Ga. 1995)16

Karcher v. Daggett,
462 U.S. 725 (1983).....16

Kos Pharms., Inc. v. Andrx Corp.,
369 F.3d 700 (3d Cir. 2004)6

Kowalski v. Tesmer,
543 U.S. 125 (2004).....9, 10

Lance v. Coffman,
549 U.S. 437 (2007).....9

Larios v. Cox,
305 F. Supp. 2d 1335 (N.D. Ga. 2004).....12

Lujan v. Defs. of Wildlife,
504 U.S. 555 (1992).....8

Mellow v. Mitchell,
607 A.2d 204 (1992).....13, 17, 18

Merrill v. Milligan,
142 S. Ct. 879 (2022) (Kavanaugh, J., concurring).....13

Pennhurst State Sch. & Hosp. v. Halderman,
465 U.S. 89 (1984).....19

Pileggi v. Aichele,
843 F. Supp. 2d 584 (E.D. Pa. 2012).....13

Punnett v. Carter,
621 F.2d 578 (3d Cir. 1980)7

Purcell v. Gonzalez,
549 U.S. 1 (2006).....21

Reilly v. City of Harrisburg,
858 F.3d 173 (3d Cir. 2017), *as amended* (June 26, 2017)6, 7

Scott v. Germano,
381 U.S. 407 (1965).....10

Shayer v. Kirkpatrick,
541 F. Supp. 922 (W.D. Mo. 1982), *aff'd sub nom.*, *Schatzle v. Kirkpatrick*, 456 U.S. 966 (1982)17

Tennant v. Jefferson Cnty. Comm'n,
567 U.S. 758 (2012).....16

Trinity Indus., Inc. v. Chi. Bridge & Iron Co.,
735 F.3d 131 (3d Cir. 2013)7

Upham v. Seamon,
456 U.S. 37 (1982).....12

Wesberry v. Sanders,
376 U.S. 1 (1964).....15

Winter v. Nat. Res. Def. Council, Inc.,
555 U.S. 7 (2008).....20

Wise v. Circosta,
978 F.3d 93 (4th Cir. 2020), *application for stay denied*, 141 S. Ct.
658 (U.S. Oct. 28, 2020).....9

Statutes

2 U.S.C. § 2a(c).....*passim*

2 U.S.C. § 2c6, 10, 11, 14

INTRODUCTION

While a preliminary injunction is itself an extraordinary remedy, the relief Plaintiffs seek here—to abrogate a congressional map adopted by Pennsylvania’s highest court and order at-large elections—is unprecedented. No court has held that a state court violates the U.S. Constitution by implementing a lawful congressional map where the legislature has failed to do so, or by altering election-related deadlines to facilitate the implementation of that map. For good reason: the Supreme Court has instructed that federal courts must not “obstruct state reapportionment nor permit federal litigation to be used to impede it.” *Grove v. Emison*, 507 U.S. 25, 34 (1993). This Court need not address Plaintiffs’ meritless demands. Plaintiffs lack standing to advance the Elections Clause claims on which their Motion for Preliminary Injunction (“Motion”) is based¹ and which fail as a matter of law in any event, and the other claims advanced in their most recent pleadings are either constitutionally barred or fail on the merits. The Court should deny Plaintiffs’ Motion.

BACKGROUND

I. State Court Proceedings

In December 2021, when it became evident that Pennsylvania’s political branches would not agree on a congressional map, the Carter Petitioners—voters in overpopulated congressional districts—filed a petition in Pennsylvania’s

¹ As the Carter Petitioners and Defendants set forth in their motions to dismiss, the legal defects in Plaintiffs’ lawsuit require its dismissal under Rule 12(b)(1).

Commonwealth Court alleging malapportionment. *See* Second Am. Compl. (“SAC”) Ex. 1, ECF No. 49-1. Consistent with decades of precedent, they asked the court to adopt a map for the 2022 elections. *See id.*

On December 20, the Commonwealth Court scheduled a hearing, announcing it would adopt a map if the General Assembly and Governor failed to enact one by January 30, 2022, and that its hearing would address anticipated “revisions to the 2022 election schedule/calendar.” Exhibit A at 2. The court also invited parties to seek intervention by December 31, 2021. *Id.* Ten parties moved to intervene, including the General Assembly’s Republican and Democratic leadership, Governor Wolf, current and former members of Pennsylvania’s congressional delegation, and multiple groups of voters. Plaintiffs did not seek intervention.

The Commonwealth Court granted intervention to six parties and *amici* status to the rest; all participated in the court’s process to adopt a congressional map. *See* SAC Ex. 4, ECF No. 49-4. In their intervention applications, Pennsylvania’s “Legislative Leaders” stated that they did not “contest” that, “[w]hen . . . the legislature is unable or chooses not to act, it becomes the judiciary’s role to determine the appropriate redistricting plan,” Exhibit B at 5 (citing *League of Women Voters v. Commonwealth*, 178 A.3d 737, 822 (2018)); and they interposed no objection to “the commencement of a judicial redistricting process,” *id.* at 8, or the state courts’ power to modify the election schedule, as they had done after past

impasses; Exhibit C at 6 (citing *Mellow v. Mitchell*, 607 A.2d 204, 237 (1992)). The Legislative Leaders also conceded that the case raised no Elections Clause issues, because “it is settled law that state courts have authority to declare and remedy violations of the U.S. Constitution, even with respect to laws governing congressional elections.” Exhibit B at 5 n.2 (citing *Grove*, 507 U.S. at 32–36).

Parties and *amici* submitted 13 maps to the Commonwealth Court for consideration. SAC Ex. 4. The court held a two-day evidentiary hearing, restating that it would adopt one of the proposed maps if the political process failed to result in a map by January 30, and expressly requesting comments from all parties about election deadline changes. SAC Exs. 4, 9 at 14–15, ECF No. 49-4, 49-9.

Meanwhile, Governor Wolf vetoed the General Assembly’s proposed map on January 26. *Id.* On February 2, the Pennsylvania Supreme Court exercised extraordinary jurisdiction, designated as Special Master the Commonwealth Court judge who presided over the lower court proceedings, and scheduled argument for February 18. SAC Ex. 8, ECF No. 49-8. The Pennsylvania Supreme Court temporarily suspended the current primary election calendar, SAC Ex. 10, ECF No. 49-10, and entertained intervention motions and amicus briefs from new parties. Plaintiffs still did not seek to participate.

In advance of the February 18 argument, the Secretary recommended minor modifications to the existing election schedule, such as extending the deadline for

nomination petitions from March 8 to March 15, that would both be “feasible” for the Commonwealth and “minimize disruption” of the 2022 elections. Exhibit D at 2. The Secretary explained that primary elections could proceed as scheduled if the Pennsylvania Supreme Court adopted a plan by February 27. *Id.* at 8.

The Pennsylvania Supreme Court announced the adoption of the 2022 Congressional Map on February 23. SAC Ex. 11, ECF No. 49-11. The Court retained the Commonwealth’s statutorily-set May 17, 2022 primary date and pushed the deadline by which petitions must be filed with the Secretary by one week. *Id.* Congressional candidates have been circulating nomination petitions under the 2022 Congressional Map for twelve days, and state officials have taken numerous steps to implement the Map. *See id.* at 3; MTD Ex. 1, ECF No. 59-1.²

II. Federal Court Proceedings

Throughout the entirety of the months-long state court proceedings, Plaintiffs not once sought to participate. They did not seek to intervene when the Commonwealth Court expressly invited intervenors, making clear both that the court intended to adopt a map if the political branches could not, and that it would move deadlines as necessary to effectuate that process. Nor did they intervene when the

² The Pennsylvania Supreme Court indicated that a written opinion explaining its decision would follow, SAC Ex. 11 at 4; that opinion has not yet issued.

case was taken up by the Pennsylvania Supreme Court, which also made clear that it intended to adopt a map.

Instead, Plaintiffs simply watched and waited. It was not until February 11, 2022 when Plaintiffs finally acted. But rather than attempt to belatedly insert themselves into the state action, they initiated litigation that collaterally attacks those proceedings and the judgment of Pennsylvania's highest court. Compl., ECF No. 1.

In their complaint, Plaintiffs alleged that Pennsylvania's state courts lacked authority to order a remedial map under any circumstances, alleging a violation of the Elections Clause and 2 U.S.C. § 2a(c)(5). *Id.* On February 20, Plaintiffs filed a first amended complaint to add a new plaintiff. Am. Compl., ECF No. 7. That same day, Plaintiffs filed the present Motion for a TRO and/or preliminary injunction, asking this Court to order Pennsylvania to conduct at-large elections on the theory that state courts are wholly barred from implementing remedial congressional plans. Motion at 8, ECF No. 11.³

On February 25, the Court denied Plaintiffs' motion for a TRO. Plaintiffs then moved for leave to file a second amended complaint, alleging for the first time that the 2022 Congressional Map's two-person deviation violates the principle of one-person, one-vote and that it is therefore malapportioned. *See generally* SAC, ECF

³ Plaintiffs' request for preliminary relief was earlier filed as ECF No. 8 but re-filed one day later in response to this Court's scheduling order, ECF No. 9.

No. 49. The next day, *before* this Court granted leave to file, Plaintiffs sought relief from the Supreme Court on all their claims. *See* Notice of Appeal, ECF No. 50 (docketed on Feb. 28, 2022 at 4:47 a.m.); Order, *Toth v. Chapman*, No. 22-0208-JPW (M.D. Pa. Feb. 28, 2022), ECF No. 55 (docketed on Feb. 28, 2022 at 12:18 p.m.). The Carter Petitioners and Defendants opposed Plaintiffs’ Supreme Court Application, and the Supreme Court denied it. *See* Order, ECF No. 73. Plaintiffs have not sought preliminary injunctive relief from this Court on their malapportionment claim.

On March 4, Plaintiffs again shifted course and now “readily acknowledge that *Branch [v. Smith]* allows courts to remedy violations of 2 U.S.C. § 2c by drawing single-member districts.” MTD Opp. at 13, ECF No. 67.

LEGAL STANDARD

“Preliminary injunctive relief is an extraordinary remedy and should be granted only in limited circumstances.” *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (quotations and citation omitted). The party seeking relief “must meet the threshold for the most critical factors: it must demonstrate that it can win on the merits,” which requires more than the “mere possibility” that relief will be granted, “and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief.” *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 & n.3 (3d Cir. 2017), *as amended* (June 26, 2017) (citations and quotations omitted). “If

these gateway factors are met, a court then considers the remaining two factors”: “the possibility of harm to other interested persons from the grant or denial of the injunction” and “the public interest”—and “determines in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief.” *Id.* at 176, 179.

Importantly, “when the preliminary injunction is directed not merely at preserving the status quo,” but seeks to change the status quo through a mandatory injunction, “the burden on the moving party is particularly heavy.” *Punnett v. Carter*, 621 F.2d 578, 582 (3d Cir. 1980). In such a case, “the moving party’s ‘right to relief must be *indisputably clear*.’” *Trinity Indus., Inc. v. Chi. Bridge & Iron Co.*, 735 F.3d 131, 139 (3d Cir. 2013) (emphasis added) (quoting *Communist Party of Ind. v. Whitcomb*, 409 U.S. 1235, 1235 (1972)).

ARGUMENT

I. Plaintiffs’ right to relief is not indisputably clear.

Plaintiffs fall far short of showing a “reasonable probability” of success, *see* Motion at 6, let alone that their right to relief is “indisputably clear,” *Trinity Indus.*, 735 F.3d at 139.⁴

⁴ Plaintiffs’ Motion addresses only their Elections Clause claims, and those, too, on a theory they have since disclaimed. Because Plaintiffs have asserted new claims and legal theories since filing their Motion, the Carter Petitioners address Plaintiffs’ latest merits arguments (asserted in their motion to dismiss opposition), while

A. Plaintiffs lack standing to assert the claims underlying their Motion.

As the Carter Petitioners set forth in their motion to dismiss, Plaintiffs do not meet the requirements of constitutional or prudential standing for their Elections Clause claims—the only claims at issue in this Motion.

Plaintiffs lack Article III standing because they fail to allege any “concrete and particularized” injury-in-fact. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Any so-called “depriv[ation]” of an “entitlement to vote in all 17 congressional races” does not amount to a cognizable injury because it would be felt by all Pennsylvania voters equally. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 344 (2006) (standing absent where plaintiff “suffers in some indefinite way in common with people generally”).

The Third Circuit has similarly rejected the interest that candidate-Plaintiffs assert in the rules governing their elections. *Bognet v. Sec’y Commonwealth of Pa.*, 980 F.3d 336, 351 (3d Cir. 2020), *cert. granted, judgment vacated as moot*. *Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021) (holding election rule did not affect candidate “in a particularized way” because “all candidates in Pennsylvania . . . are subject to the same rules”). And, the Supreme Court has rejected standing based on

reserving their argument that Plaintiffs have waived the arguments underlying their revised legal strategy. *See Hu v. Att’y Gen. of U.S.*, 219 F. App’x. 254, 258 n. 4 (3d Cir. 2007) (finding argument waived and abandoned when not pursued in argument section of brief).

undifferentiated grievances or abstract policy statements, *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018), like an interest in overseeing the lawful administration of elections, as election official-Plaintiff alleges here. *See* SAC ¶ 57.

That none of Plaintiffs' alleged injuries are sufficient to trigger this Court's jurisdiction is further underscored by the fact that their Motion is based solely on purported Elections Clause violations, which the Supreme Court has held private citizens lack standing to prosecute because the alleged injury is "obvious[ly]" an "undifferentiated, generalized grievance about the conduct of government." *Lance v. Coffman*, 549 U.S. 437, 442 (2007). Consistent with *Lance*, federal courts have repeatedly declined to adjudicate Elections Clause claims brought by individual plaintiffs. *See, e.g., Wise v. Circosta*, 978 F.3d 93, 101 (4th Cir. 2020), *application for stay denied*, 141 S. Ct. 658 (U.S. Oct. 28, 2020); *Corman v. Torres*, 287 F. Supp. 3d 558, 567 (M.D. Pa. 2018). This Court should follow suit.

Even if Plaintiffs had suffered a sufficient injury-in-fact, they do not possess prudential standing, as their claim is premised on the *General Assembly's* authority to draw districts, *see* SAC ¶¶ 60-61, rather than Plaintiffs' "own legal rights and interests," *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Because Plaintiffs have identified neither a "close relationship with the [General Assembly]" nor a "hindrance" to [its] ability to

protect [its] own interests,” *id.* at 130, they cannot assert the General Assembly’s rights, *see Corman*, 287 F. Supp. 3d at 571–73.

Without standing, Plaintiffs have *no* right to relief, much less one that is “indisputably clear.”

B. Plaintiffs’ Elections Clause claims fail as a matter of law.

1. The relief Plaintiffs seek is foreclosed by federal statute and Supreme Court precedent.

Plaintiffs’ original theory of this case—that the Elections Clause bars a state court from adopting a congressional plan when the legislative process fails—is foreclosed by binding Supreme Court precedent and congressional enactments pursuant to the Elections Clause itself. *See, e.g., Branch v. Smith*, 538 U.S. 254, 272 (2003) (explaining that congressional enactment “embraces action by state and federal courts when the prescribed legislative action has not been forthcoming”); *Grove*, 507 U.S. at 33 (finding state court’s “issuance of its plan (conditioned on the legislature’s failure to enact a constitutionally acceptable plan)” by date certain was “precisely the sort of state judicial supervision of redistricting [the Court] has encouraged”); *Scott v. Germano*, 381 U.S. 407, 409 (1965); *see also* 2 U.S.C. § 2c (“There shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled . . .”); *id.* § 2a(c) (listing processes for election of congressional representatives “[u]ntil a State is redistricted in the

manner provided by the law thereof”); *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 576 U.S. 787, 812 (2015).

The Motion does not grapple with this controlling authority; that alone warrants its denial. Instead, Plaintiffs have since morphed their theory of the case, but their latest theory similarly fails.⁵ Plaintiffs now claim that it is solely the Pennsylvania Supreme Court’s modification of *election-related deadlines* that requires at-large elections. MTD Opp. at 18. Namely, Plaintiffs assert it became too late for the state court to act the moment it changed *any* election-related deadline, regardless of when the change was made or that the primary date remained the same.

In support, Plaintiffs grasp at an isolated phrase from *Branch* about “disrupting the election process,” *see* MTD Opp. at 5, 13, 14, 18, 20, and ignore the very limited circumstance in which a plurality of justices found § 2a(c)(5) would apply.⁶ Indeed, in the same paragraph Plaintiffs cite, the plurality unequivocally found that § 2a(c)(5) is “inapplicable *unless* the state legislature, *and* state . . . courts, have all failed to redistrict pursuant to § 2c,” *Branch*, 538 U.S. at 275, and is only “a *last-resort* remedy” in the narrow circumstance when, “on the eve of a

⁵ Plaintiffs now “readily acknowledge that the state judiciary can draw maps.” at 19; *compare id.* at 17 with SAC ¶ 60.

⁶ Three other justices found that § 2a(c)(5) had been impliedly repealed and would never require at-large elections. *Branch*, 538 U.S. at 285 (2003) (Stevens, J., concurring).

congressional election, no constitutional redistricting plan exists and there is *no time* for either the State’s legislature *or the courts* to develop one,” *id.* (emphases added).

Here, there was undoubtedly “time” for the Pennsylvania courts to develop a new congressional map—it did so, twelve weeks before the primary election. Nothing in federal law or Supreme Court precedent bars courts from altering pre-election deadlines to facilitate implementation of a congressional map. Such alterations are essential to crafting a remedy for the underlying legal violations caused by a political impasse—a remedy the Supreme Court has encouraged state courts to formulate. *See, e.g., Growe*, 507 U.S. at 37. There is no reasonable way to read binding precedent “specifically encourag[ing]” state courts to adopt congressional maps upon a political impasse, *Growe*, 507 U.S. at 34, to simultaneously prohibit those courts from altering election deadlines to effectuate that remedy.

State and federal courts alike modify election deadlines when needed to enforce lawful redistricting plans, and the Supreme Court has authorized judicial alteration of the election schedule in these circumstances. *See, e.g., Upham v. Seamon*, 456 U.S. 37, 44 (1982) (“[W]e leave it to [the District Court] in the first instance to determine whether to . . . reschedule the [congressional] primary elections.”); *see also Larios v. Cox*, 305 F. Supp. 2d 1335, 1343 (N.D. Ga. 2004); Order, *In the Matter of 2022 Legislative Districting of the State*, Misc. Nos. 21, 24,

25, 26, 27 (Md. Feb. 11, 2022) (postponing 2022 primary filing deadlines); Order, *Harper v. Hall*, No. 413P21 (N.C. Dec. 8, 2021) (same); *Mellow*, 607 A.2d at 237, 244 (revising pre-primary deadlines after impasse “to provide for an orderly election process”).

Following this well-worn path, Pennsylvania’s Supreme Court made minor modifications to certain election deadlines leading up to the May 17 primary “[t]o provide for an orderly election process” alongside its adoption of a congressional map. SAC Ex. 11 at 3, ECF No. 49-11. These slight modifications were made “easily,” on the Secretary’s own recommendation, without any evidence of “undue collateral effect”—all while leaving the date of the primary election intact.⁷ *Cf. Merrill v. Milligan*, 142 S. Ct. 879, 881 n.1 (2022) (Kavanaugh, J., concurring) (“How close to an election is too close may depend in part on . . . how easily the State could make the change without undue collateral effects.”). Notably, the Legislative Leaders expressly endorsed the state courts’ power to modify the

⁷ Plaintiffs fail to acknowledge that their requested relief would itself upend the election calendar currently in place. The fact that the 2022 Congressional Map is being implemented only underscores that this case is the *opposite* of those in which courts have chosen *not* to shift election deadlines. *Pileggi v. Aichele*, 843 F. Supp. 2d 584, 596 (E.D. Pa. 2012) (“With election deadlines quickly approaching, and no existing alternative reapportionment plan, Defendant needs certainty as to how to proceed.”); *see Diaz v. Silver*, 932 F. Supp. 462, 468–69 (E.D.N.Y. 1996) (listing cases holding that, without any alternative redistricting plan readily available, harm to the public in changing election rules or dates outweighs likely benefit to plaintiffs of granting a preliminary injunction).

election schedule, arguing that “nominating petition deadlines” have been moved by state courts in the past and “could still be moved in this election cycle.” Exhibit C at 6 (citing *Mellow*, 607 A.2d at 237). And at no point did they object to the election calendar changes that were proposed by either the Special Master or the Secretary.

Plaintiffs offer no authority or evidence to the contrary. A constitutional congressional map was implemented in “time,” and elections are proceeding accordingly. Therefore, “§ 2a(c) cannot be properly applied” because the state “court[] . . . effect[ed] the redistricting mandated by § 2c.” *Branch*, 538 U.S. at 275.

2. Adopting Plaintiffs’ theory would lead to absurd results.

The practical effect of Plaintiffs’ theory would be absurd. Since Congress enacted § 2c in 1967, no state has conducted at-large congressional elections. And Plaintiffs’ rigid theory of “timeliness” under § 2c would functionally preclude state courts from resolving political impasses in redistricting. State courts typically wait to adjudicate impasse actions until later in the process, when it becomes abundantly clear that the political branches will not be able to agree. But if they take steps to redistrict “too late,” the federal courts may step in. *See Growe*, 507 U.S. at 34 (explaining federal courts must defer to state courts on reapportionment “[a]bsent evidence that [the state court] will fail to timely perform that duty”). Plaintiffs would add a new complication to this process: at some point (although exactly when is not perfectly clear from Plaintiffs’ papers) a litigant who is unhappy with the trajectory

of the state court proceedings could run to federal court and demand at-large elections. Plaintiffs’ theory thus cannot be squared with the Supreme Court’s endorsement of state courts’ role in remedying impasses, *see supra* pp. 10–11.

C. Plaintiffs’ equal population claim fails on the merits.

Plaintiffs’ Motion does not seek an injunction based on their malapportionment claim, but that claim is also meritless. Article I, § 2 of the U.S. Constitution establishes that congressional districts must be apportioned to contain equal population “as nearly as practicable.” *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964). No court has ever held that a congressional map with a plus-or-minus-one-person deviation (like the 2022 Congressional Map)—as opposed to an absolute one-person deviation—does not satisfy this requirement. Indeed, the opposite is true. *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 664 (D.S.C. 2002) (finding court plan with two-person deviation “complies with the ‘as nearly as practicable’ population equality requirement . . . with a deviation of plus or minus one person.” (citing *Karcher v. Daggett*, 462 U.S. 725, 730 (1983))); *see also Essex v. Kobach*, 874 F. Supp. 2d 1069, 1088 (D. Kan. 2012) (“The Court’s plan results in two districts with populations of 713,278 and two with populations of 713,281 . . . [which] satisfies Article I, Section 2.”).⁸

⁸ Likewise, since 2000, at least six states have adopted congressional apportionment plans with two-person deviations. *See, e.g.,* Oregon and Georgia (two-person

Additionally, Supreme Court precedent speaks only of “*significant* variance between districts” as raising constitutional concerns. *Karcher*, 462 U.S. at 730–31 (emphasis added). Even if the 2022 Congressional Map’s two-person deviation—a difference of only one person from perfect equality, given the odd number of districts—did not fall within the plus-or-minus one person requirement of population equality, it is not the kind of *significant* deviation that requires further review or justification. *Cf. Tennant*, 567 U.S. at 762–65 (accepting justifications for 4,871-person deviation in congressional plan); *Abrams v. Johnson*, 521 U.S. at 99–100 (finding court-ordered congressional plan with “slight deviation[]” of 2,047 persons justified); *see also Johnson v. Miller*, 922 F. Supp. 1556, 1571–72 (S.D. Ga. 1995) (listing absolute population of each district in the map at issue in *Abrams*). Thus, Plaintiffs’ malapportionment claim fails as a matter of law.

In any event, the 2022 Congressional Map’s two-person deviation *is* justified—and the justification precisely aligns with the Supreme Court’s prior decisions. Although the Pennsylvania Supreme Court has not yet issued an opinion

population range after 2010 redistricting cycle); South Carolina and Colorado (two-person population range in court-enacted plans after 2000 redistricting cycle); and Kentucky and Maryland (two-person population range after 2000 redistricting cycle); *see also* “2010 Redistricting Deviation Table,” Nat’l Conf. State Legislatures (Jan. 15, 2020), <https://www.ncsl.org/research/redistricting/2010-ncsl-redistricting-deviation-table.aspx>; “Designing P.S. 94-171 Redistricting Data for the Year 2010 Census,” U.S. Census Bureau (Sept. 2004), https://www2.census.gov/programs-surveys/rdo/2010_pl94-171rv.pdf, at 26.

setting forth its reasons for adopting the 2022 Congressional Map, it was aware that any steps to further equalize population in that Map would have required an additional election precinct split.⁹ Courts have approved such tradeoffs as sufficient justification for much greater population deviations than the one here. *See Shayer v. Kirkpatrick*, 541 F. Supp. 922, 933–34 (W.D. Mo. 1982), *aff'd sub nom.*, *Schatzle v. Kirkpatrick*, 456 U.S. 966 (1982) (adopting court-drawn plan with 961-person deviation and holding that such “minor deviations based on preserving definitive county and political subdivisions are permissible”); *Mellow*, 607 A.2d at 208, 218, 237–43 (holding 63-person deviation was “fully justified by the policy of preserving the boundaries of municipalities and precincts” and adopting conclusion that “a serious election administration problem arises from requiring the voters in a single precinct to look to two different sets of congressional candidates”).

Plaintiffs provide no reason to second-guess the judgment of the Commonwealth’s highest court that the 2022 Congressional Map (and its two-person deviation) achieves a legitimate state goal. The fact that the Special Master’s recommended map has a one-person deviation does not change that conclusion. That map—which was vetoed by the Governor—scored worse than the 2022

⁹ The Carter Petitioners provided the Pennsylvania Supreme Court with an alternative map that had a one-person population deviation at the expense of an additional voting district split. *See* Exhibit E. That court chose not to adopt the alternative.

Congressional Map on a variety of metrics, including county splits and retention of prior district populations. *See* Exhibit F at 2, 4. The Pennsylvania Supreme Court had to consider similar tradeoffs between the 2022 Congressional Map and each of the proposed maps, *see id.*, and ultimately chose the map that adhered most closely to all of the state’s map-drawing criteria.

Finally, even if the 2022 Congressional Map’s population deviation were “unacceptable,” the proper remedy would be to “require some very minor changes in the court’s plan—a few shiftings of precincts—to even out districts with the greatest deviations.” *Abrams*, 521 U.S. at 100. It would not warrant the unprecedented elimination of congressional districts altogether.

D. The Eleventh Amendment bars Plaintiffs’ claim that the Pennsylvania Supreme Court did not follow Pennsylvania’s “policies and preferences” in choosing a congressional map.

To the extent Plaintiffs now assert that their Elections Clause claims are grounded in the Pennsylvania Supreme Court’s failure to abide by *Pennsylvania* law in its choice of a congressional map, that claim is barred by the Eleventh Amendment. *See* MTD Opp. at 21.

While Plaintiffs try to disguise their gripe with the 2022 Congressional Map as a federal constitutional violation, they advance nothing more than disagreements over the application of Pennsylvania’s “policies and preferences.” As such, they seek a federal injunction against state officials for alleged violations of state law—

precisely the relief barred under the Eleventh Amendment. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984) (holding “a federal suit against state officials on the basis of state law contravenes the Eleventh Amendment when . . . the relief sought and ordered has an impact directly on the State itself”); *Balsam v. Sec’y of State*, 607 F. App’x 177, 183–84 (3d Cir. 2015) (Eleventh Amendment bars state law claims even when “premised on violations of the federal Constitution”).

II. Plaintiffs do not establish likely irreparable harm.

Plaintiffs’ failure to allege a cognizable injury is fatal to their ability to demonstrate irreparable harm. “A court may not grant . . . injunctive relief without” a showing that plaintiffs “are likely to experience irreparable harm without an injunction.” *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484 (3d Cir. 2000). Although Plaintiffs claim they are “suffering irreparable harm from the defendants’ failure to obey the requirements of the Elections Clause and 2 U.S.C. § 2a(c),” they cannot rely on generalized injuries arising out of novel Elections Clause claims to show irreparable harm. *See supra* pp. 8–9. “To the contrary,” courts “finding that a violation of a constitutional right alone constitutes irreparable harm are limited to cases involving individual rights, not the allocation of powers among the” federal and state legislatures under the Elections Clause. *Aposhian v. Barr*, 958 F.3d 969, 990 (10th Cir. 2020) (rejecting finding of irreparable harm where plaintiff alleged “generalized separation of powers” violation).

Moreover, the purported harms Plaintiffs identify have since been rendered moot: the Pennsylvania Supreme Court has ordered elections to proceed under a new schedule that not only permits candidate-Plaintiffs to collect signatures and campaign, but ensures that election official-Plaintiff may timely execute the election. SAC Ex. 11. These new facts only further demonstrate that Plaintiffs' alleged harms were *never* actual or imminent, but instead arise from Plaintiffs' own conduct or are speculative. "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with [the courts' recognition that] injunctive relief [i]s an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (citing *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam)). Plaintiffs have failed to carry their burden of showing irreparable harm.

III. Equity and the public interest weigh against an injunction.

Both the "balance of the equities" and the "public interest" strongly disfavor enjoining the 2022 Congressional Map and ordering at-large elections. The Supreme Court has counseled that "[a]s an election draws closer," court orders affecting election rules "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006). This principle is especially salient here.

The election is already proceeding under the 2022 Congressional Map: candidates are more than halfway through the nomination process; the deadline to file nomination petitions is one week away; and Defendants are readying for the primary under that Map in ten weeks. Enjoining the Map now would require substantial revisions to the election calendar (at significant expense to the Commonwealth), severely prejudice the congressional campaigns already underway, and create massive confusion for candidates, voters, and election officials alike—not to mention the disruption and inequities of eliminating districted congressional elections in Pennsylvania for the first time in more than 200 years.

Plaintiffs also have no justification for seeking emergency relief on the eve of an election where they strategically elected not to participate in the process until the eleventh hour. *See supra* pp. 1–6. The equities and the public interest clearly cut against granting an injunction.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs’ Motion for Preliminary Injunction.

Dated: March 8, 2022

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**Motions for Pro Hac Vice
Forthcoming*

***Admitted Pro Hac Vice*

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Opposition to Plaintiffs' Preliminary Injunction contains 4,992 words, based on the word count of the word processing system used to prepare this brief, and thereby complies with the Local Civil Rule 7.8.

Dated: March 8, 2022

/s/ Elizabeth V. Wingfield

Exhibit A

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carol Ann Carter, Monica Parrilla, : **CASES CONSOLIDATED**
Rebecca Poyourow, William Tung, :
Roseanne Milazzo, Burt Siegel, :
Susan Cassanelli, Lee Cassanelli, :
Lynn Wachman, Michael Guttman, :
Maya Fonkeu, Brady Hill, Mary Ellen :
Balchunis, Tom DeWall, :
Stephanie McNulty and Janet Temin, :
Petitioners :

v. : No. 464 M.D. 2021

Veronica Degraffenreid, in her official :
capacity as the Acting Secretary of the :
Commonwealth of Pennsylvania; :
Jessica Mathis, in her official capacity :
as Director for the Pennsylvania Bureau :
of Election Services and Notaries, :
Respondents :

Philip T. Gressman; Ron Y. Donagi; :
Kristopher R. Tapp; Pamela Gorkin; :
David P. Marsh; James L. Rosenberger; :
Amy Myers; Eugene Boman; :
Gary Gordon; Liz McMahan; :
Timothy G. Feeman; and Garth Isaak, :
Petitioners :

v. : No. 465 M.D. 2021

Veronica Degraffenreid, in her official :
capacity as the Acting Secretary of the :
Commonwealth of Pennsylvania; :
Jessica Mathis, in her official capacity :
as Director for the Pennsylvania Bureau :
of Election Services and Notaries, :
Respondents :

PER CURIAM

ORDER

AND NOW, this 20th day of December, 2021, in consideration of the petitions for review filed in the above-consolidated actions, which are addressed to this Court's original jurisdiction, and consistent with the process established in *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), it is hereby ORDERED:

1. Any applications to intervene, *see* Pa. R.A.P. 1531(b), shall be filed by December 31, 2021. Answers thereto shall be due within four (4) days of the date the application to intervene is filed.

2. Any party to this proceeding who wishes to submit to the Court for its consideration a proposed 17-district congressional reapportionment plan consistent with the results of the 2020 Census shall file the proposed plan by January 28, 2022.

3. If the General Assembly and the Governor fail to enact a congressional reapportionment plan by January 30, 2022, the Court will select a plan from those plans timely filed by the parties.

4. In the event the Court must select a congressional reapportionment plan, the Court will hold a final hearing beginning on January 31, 2022, to receive evidence and consider all timely filed proposed plans. The Court will also consider revisions to the 2022 election schedule/calendar as part of the hearing. The hearing will begin at 9:30 a.m. in Courtroom 3001 of the Pennsylvania Judicial Center, Harrisburg, PA. It shall be the responsibility of Petitioners to secure the services of a court reporter(s) throughout the duration of the hearing.

5. Consistent with the authority granted to the General Assembly under the Elections Clause of the United States Constitution, art. I, § 4, cl. 1, Petitioners are hereby directed to serve immediately a copy of this Order on the Pennsylvania Senate Majority and Democratic Leaders and on the Pennsylvania House of Representatives Majority and Democratic Leaders and file proof of service with this Court.

Exhibit B

IN THE SUPREME COURT OF PENNSYLVANIA

No. 141 MM 2021

Carol Ann Carter; Monica Parrilla; Rebecca Poyourow; William Tung; Roseanne Milazzo; Burt Siegel; Susan Cassanelli; Lee Cassanelli; Lynn Wachman; Michael Guttman; Maya Fonkeu; Brady Hill; Mary Ellen Bachunis; Tom DeWall; Stephanie McNulty; and Janet Temin,

Petitioners,

vs.

Veronica Degraffenreid, in Her Capacity as Acting Secretary of the Commonwealth of Pennsylvania; and Jessica Mathis, in Her Capacity as Director of the Bureau of Election Services and Notaries,

Respondents.

No. 142 MM 2021

Philip T. Gressman; Ron Y. Donagi; Kristopher R. Tapp; Pamela A. Gorkin; David P. Marsh; James L. Rosenberger; Amy Myers; Eugene Boman; Gary Gordon; Liz McMahan; Timothy G. Feeman; and Garth Isaak

Petitioners,

vs.

Veronica Degraffenreid, in Her Capacity as Acting Secretary of the Commonwealth of Pennsylvania; and Jessica Mathis, in Her Capacity as Director of the Bureau of Election Services and Notaries,

Respondents.

OPPOSITION OF PROPOSED INTERVENORS BRYAN CUTLER, SPEAKER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES; KERRY BENNINGHOFF, MAJORITY LEADER OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES; JAKE CORMAN, PRESIDENT PRO TEMPORE OF THE PENNSYLVANIA SENATE; AND KIM WARD, MAJORITY LEADER OF THE PENNSYLVANIA SENATE TO PETITIONERS' APPLICATIONS FOR EXERCISE OF EXTRAORDINARY RELIEF OR KING'S BENCH POWER

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** Pro Hac Vice application forthcoming*

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Neither set of Petitioners meets the “heavy burden” of justifying the exercise of extraordinary jurisdiction here. *Wash. Cty. Comm’rs v. Pa. Lab. Rels. Bd.*, 490 Pa. 526, 532, 417 A.2d 164, 167 (1980). Most of the issues in these matters are not difficult and do not call for this Court’s review, at least in this posture.

There is no dispute that the Commonwealth’s existing congressional district plan cannot be used in future elections. And, although there is still time for the General Assembly and the Governor to reach an accord and enact a new congressional redistricting plan, the Commonwealth Court, in its order of December 20, 2021, has ordered judicial redistricting proceedings. Based on that order, the Commonwealth Court has implicitly concluded that the process has advanced to a stage where judicial redistricting proceedings are appropriate even though the General Assembly has “the primary responsibility and authority for drawing federal congressional legislative districts.”¹ *League of Women Voters v. Commonwealth*, 645 Pa. 1, 129, 178 A.3d 737, 821 (2018). No matter which court adjudicates this case, it will have little or no difficulty enjoining the existing plan or ordering the commencement of remedial proceedings. That issue is not of “immediate public importance.” 42 Pa. Stat. and Cons. Stat. § 726.

¹ The Commonwealth’s political actors continue to work toward a legislative solution. If these efforts succeed, the resulting legislation would set the congressional districts for future elections by operation of law, regardless of how far judicial proceedings have advanced and even if they have yielded a final judgment.

What *may* prove difficult and important is reviewing proposed plans and fashioning a remedy. Although Petitioners make these remedial proceedings the focus of their applications, they ignore institutional interests and competencies that counsel in favor of the familiar two-step process of trial-court adjudication and appellate review. And they inexplicably ask this Court to adopt a new redistricting plan without evidentiary proceedings or an opportunity for public input. A judicial redistricting process, like a legislative redistricting process, should be fact- and labor-intensive and involve opportunities for input and proposals, adversarial proceedings to establish facts germane to those proposals, and evidentiary hearings and submissions to ascertain an acceptable and lawful redistricting solution. In the prior impasse case that Petitioners cite, *Mellow v. Mitchell*, 530 Pa. 44, 607 A.2d 204 (1992), a full evidentiary record was developed and trial proceedings were conducted before this Court adopted congressional redistricting remedies. The Commonwealth Court is the best-situated institution to conduct evidentiary proceedings, and this Court is the best-situated institution to review that court's judgment.

The applications for extraordinary review fail to establish, or even address, why extraordinary review is preferable to that familiar process, appropriately expedited. They should be denied. Alternatively, even if this Court exercises extraordi-

nary jurisdiction, it should provide for evidentiary proceedings and reject Petitioners' request to select a new redistricting plan solely on the basis of legal briefs and lawyers' arguments, without the benefit of a full vetting that the process deserves.

BACKGROUND

After each decennial census, “States must redistrict to account for any changes or shifts in population.” *Georgia v. Ashcroft*, 539 U.S. 461, 489 n.2 (2003). In Pennsylvania, “the primary responsibility and authority for drawing federal congressional legislative districts rests squarely with the state legislature.” *League of Women Voters*, 645 Pa. at 129, 178 A.3d at 821. However, it is not contested in this case that, “[w]hen . . . the legislature is unable or chooses not to act, it becomes the judiciary’s role to determine the appropriate redistricting plan.”² *League of Women Voters*, 645 Pa. at 130, 178 A.3d at 822.

² Officers of the General Assembly have argued in prior litigation, including the *League of Women Voters* case, that the “Elections Clause” of Article I, section 4 of the U.S. Constitution forecloses state courts from enforcing *state* law against an act of the state’s legislature, or at least imposes limitations when they do so. The difference here is that the current congressional plan contravenes the U.S. Constitution, and it is settled law that state courts have authority to declare and remedy violations of the U.S. Constitution, even with respect to laws governing congressional elections. *See Growe v. Emison*, 507 U.S. 25, 32–36 (1993). Proposed Intervenors do not dispute that the Pennsylvania courts have the authority to adjudicate Petitioners’ claims for violations of the U.S. Constitution or other federal laws, and it appears that the state-law issues they raise implicate standards that duplicate federal standards.

The relevant facts of this case are not in dispute. Pennsylvania’s existing congressional plan was fashioned by this Court in 2018 based upon the 2010 census results. *League of Women Voters*, 645 Pa. 576, 583, 181 A.3d 1083, 1087 (2018) (finding that the adopted plan achieved “equality of population”); *see also Carter* Petition ¶ 18 (alleging that the Court’s adopted plan was “based on the 2010 data”); *Gressman* Petition ¶ 2 (same).

The 2020 census results have since been released, both in the form of initial apportionment results at the level of each state and later in the form of census-block level population data suitable for redistricting *within* states. *Carter* Petition ¶¶ 19, 27; *Gressman* Petition ¶¶ 26–27. The results show, among other things, that Pennsylvania’s population has increased; that it has not increased sufficiently to keep pace with neighboring states; that Pennsylvania must lose one congressional seat, dropping from 18 to 17 seats; and that the existing districting plan—aside from being improperly crafted to yield 18 seats rather than 17—is malapportioned. *Carter* Petition ¶¶ 19–28; *Gressman* Petition ¶¶ 26–27. It is therefore undisputed that redistricting is essential for the Commonwealth to fulfill the Equal Protection Clause’s guarantee of “one person, one vote.” *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964).

The two Petitions for Review commencing these suits were filed in the Commonwealth Court on December 17, 2021. In each case, Petitioners allege that they

reside in underpopulated districts, and they assert that, without a new, properly apportioned redistricting plan, their votes will be diluted in future elections. *Carter* Petition ¶¶ 9, 49–63; *Gressman* Petition ¶¶ 10–22, 34–52. Although Proposed Intervenor do not have sufficient information to verify Petitioners’ factual assertions (such as their residencies), at the end of the day, Proposed Intervenor do not dispute the basic notion that the Commonwealth cannot use the existing congressional districting plan in 2022 elections for the simple reason that the Commonwealth cannot elect an 18-member delegation to the next Congress since it has only been apportioned 17 seats in that Congress. Nor do Proposed Intervenor disagree with the principle that the U.S. Constitution requires equally apportioned districts.

Proposed Intervenor are officers of the Pennsylvania Senate and House of Representatives who have authorization from members of the Republican Caucuses of those bodies, who possess sufficient votes to pass legislation, to seek intervention on their behalf in this suit. Proposed Intervenor have worked together with other legislators in good faith to develop a congressional redistricting plan that complies with the law and that the General Assembly could pass and present to the Governor. Although a plan has not yet been enacted, Proposed Intervenor will continue to take this approach to the work. The legislative process will continue, but Proposed In-

tervenors acknowledge that the Commonwealth Court has ordered the commencement of a judicial redistricting process, and Proposed Intervenors do not intend to file preliminary objections in either action.³

The Commonwealth Court quickly processed the Petitions, issued a scheduling order, called for petitions to intervene, and otherwise prepared to proceed expeditiously to resolve this case by early February. Although both sets of Petitioners criticize this schedule as insufficiently expedited, they did not move the Commonwealth Court to amend it.

Instead, Petitioners filed applications for extraordinary review in this Court, seeking to bypass the Commonwealth Court. They have proposed a scheduling order that would call for presentation of proposed plans and briefing regarding those plans, but no discovery or evidentiary hearings. *See Carter* Application 11; *Gressman* Application 22. Proposed Intervenors, meanwhile, petitioned the Commonwealth Court to intervene. Given the time-sensitive nature of this case, they are simultaneously filing this brief in opposition to the applications for extraordinary review, to provide the Court with adversarial briefing on those applications.

³ As the *Carter* Petitioners recount, they filed similar claims months *before* usable redistricting data were even released, and the Commonwealth Court correctly sustained preliminary objections to their original petition for review, concluding that the suit was premature and unripe. The *Carter* Petitioners did not appeal that judgment.

ARGUMENT

This case does not fall within the narrow and exceptional circumstances meriting a departure from the ordinary two-stage judicial process of trial court adjudication and appellate review. Quite the opposite. Under current conditions, it is both preferable and feasible to adhere to that traditional process, albeit on an expedited basis.

To qualify for extraordinary review, a case must raise “an issue of immediate public importance.” 42 Pa. Stat. and Cons. Stat. Ann. § 726. “This court’s exercise of extraordinary jurisdiction should be used sparingly.” *Commonwealth v. Morris*, 565 Pa. 1, 18, 771 A.2d 721, 731 (2001); *accord Wash. Cty.*, 490 Pa. at 532, 417 A.2d at 167. To begin, Petitioners must establish both that there is a heightened public interest in the issues at hand and that the ordinary litigation process is insufficient to timely remedy alleged violations of their rights. *Bd. of Revision of Taxes, City of Phila. v. City of Philadelphia*, 607 Pa. 104, 122, 4 A.3d 610, 620 (2010); *see also Carter Application 7; Gressman Application 8–9*. Furthermore, “[t]he presence of an issue of immediate public importance is not alone sufficient to justify extraordinary relief. As in requests for writs of prohibition and mandamus, we will not invoke extraordinary jurisdiction unless the record clearly demonstrates a petitioner’s rights.” *Cty. of Berks ex rel. Baldwin v. Pennsylvania Lab. Rels. Bd.*, 544 Pa. 541,

549, 678 A.2d 355, 359 (1996) (citation omitted). “Even a clear showing that a petitioner is aggrieved does not assure that this Court will exercise its discretion to grant the requested relief.” *Id.* This standard is not met here.

A. These Matters Present Fact-Intensive Questions That Do Not Meet The High Standards For Extraordinary Jurisdiction

Most of the issues in these cases are not difficult or important within the meaning of the extraordinary-jurisdiction standard, and those that *may* prove to be so are fact-intensive and not amenable to clean resolution as a matter of law.

First, the liability issues are governed by clearly established law such that no serious contest is likely to arise. Issues that qualify under the “public importance” test include those as to which this Court should “provide guidance” because they are “likely to recur,” *Morris*, 565 Pa. at 18, 771 A.2d at 731, and those that remain unresolved and concern a variety of state instrumentalities and citizens, *Bd. of Revision of Taxes*, 607 Pa. at 122, 4 A.3d at 620. But these cases raise no issues that are unresolved or are “likely to recur.” Rather, they present a “garden variety” dispute, *id.*, in the sense that there is no basis even to contest the governing legal principles or their application. *See Carter Application 7* (“[T]can be no dispute that continuation of the status quo is unconstitutional.”); *Gressman Application 1* (“The current map’s malapportionment violates the Pennsylvania Constitution.”). As the U.S. Supreme Court has explained, the one-person, one-vote rule is “easily administrable” because judges are able “to decide whether a violation has occurred (and to remedy

it) essentially on the basis of three readily determined factors—where the plaintiff lives, how many voters are in his district, and how many voters are in other districts.” *Vieth v. Jubelirer*, 541 U.S. 267, 290 (2004) (plurality opinion). There is no dispute here that the Commonwealth’s congressional districts are malapportioned, and there is unlikely to be a genuine dispute over where Petitioners reside. That portion of the case, at least, does not present “an issue of immediate public importance.” 42 Pa. Stat. and Cons. Stat. § 726.

Second, the issues that *may* rise to the level of public importance fail to qualify under independent elements of the extraordinary-review test. As noted, this Court “will not invoke extraordinary jurisdiction unless the record clearly demonstrates a petitioner’s rights.” *Cty. of Berks*, 544 Pa. at 549, 678 A.2d at 359 (citation omitted). As to any difficult and important issue, this record does not do so. The challenge in an impasse case lies in selecting a remedial districting plan. In that regard, Petitioners cannot show that the record clearly demonstrates their rights. There are infinite ways to divide the Commonwealth into 17 equally populated congressional districts, and Petitioners cannot establish a clear right to their preferred choice among numerous options. Neither set of Petitioners has even proposed a plan at this stage. The tribunal that adjudicates the facts of this case will be obliged to entertain competing proposals, take evidence, make factual findings, and make discretionary choices in fashioning a remedy. This situation is the opposite of one where “there is no factual

dispute,” and the matter of public importance raises an issue “of law, resolvable on the pleadings.” *Bd. of Revision of Taxes*, 607 Pa. at 122–23, 4 A.3d at 621. It is a poor fit for this Court’s extraordinary jurisdiction.

B. There Is Time for an Expedited Proceeding in the Commonwealth Court and Review in This Court

Petitioners are incorrect that proceedings in the Commonwealth Court “will be insufficient to timely remedy Petitioners’ rights.” *Carter* Application 8; *see also Gressman* Application 21–22 (“[T]he schedule established by the Commonwealth Court would effectively deny the parties any opportunity to appeal that Court’s judgment to this Court[.]”). Although proceedings undoubtedly must be expedited to ensure time for administration of any remedial plan, recent experience indicates that there is time for both trial and appellate proceedings here. Just three years ago, in the *League of Women Voters* litigation, this Court issued a liability ruling on January 22, 2018—after a full trial in the Commonwealth Court—and a remedial ruling on February 19, 2018. *League of Women Voters of Pa. v. Commonwealth*, 644 Pa. 287, 175 A.3d 282 (2018); *League of Women Voters of Pa. v. Commonwealth*, 645 Pa. 576, 181 A.3d 1083 (2018). In *Mellow v. Mitchell*, 530 Pa. 44, 607 A.2d 204 (1992), a final ruling came even later, on March 26 of 1992—which was an election year.

There is no indication that implementing remedies in either instance posed any administrative challenge.⁴

The Commonwealth Court is positioned to proceed on an expedited basis and issue a judgment in early February, which would permit review in this Court by the middle of February, achieve the *League of Women Voters* schedule, and outpace the *Mellow* schedule. Indeed, in *Mellow*, an order was issued providing that a court-selected plan would be imposed “if the Legislature failed to act by February 11, 1992.” *Id.* at 47, 607 A.2d at 205. Here, the Commonwealth Court set a more restrictive deadline of January 31, 2022. Furthermore, it is more important to take a few extra weeks to ensure that a suitable plan is adopted to govern the Commonwealth’s congressional elections for the next decade than to rush the process. But, if the Court perceives things differently, the appropriate remedy would be to direct the Commonwealth Court to expedite its proceedings beyond what it has already done. Yet Petitioners did not move the Commonwealth Court to amend its scheduling order.

⁴ Petitioners rely on prior assertions by the Department of State that January 24 is the deadline for a new plan, but they do not cite statutory authority for that proposition, and no one has explained why the dates that were found sufficient in *League of Women Voters* and *Mellow* are unworkable here.

C. These Cases Cannot Be Resolved Without Evidentiary Hearings, and Petitioners Fail To Explain How Extraordinary Review Is Preferable to Appellate Review

The applications contend that this Court may, through extraordinary review, bring this case to final judgment more expeditiously than adjudication in the Commonwealth Court followed by an appeal to this Court. But Petitioners ignore that, in all events, a two-step process is essential, because the fact-intensive issues of redistricting require a lengthy evidentiary hearing. The applications fail to explain why the familiar two-step process, appropriately expedited, is inferior to folding those two steps into one extraordinary review process. No reason is apparent and consolidating the entire process before this Court could lead to distrust of the process.

The two cases Petitioners rely on, *Mellow* and *League of Women Voters*, confirm the fact-intensive nature of the issues at hand and the necessity of evidentiary proceedings. Petitioners cite these cases for the proposition that they “are not asking this Court to do something it has not done before.” *Carter* Application 9; *see also Gressman* Application 5. But they *are*, in fact, making such a request, at least insofar as they request that a new plan be imposed without evidentiary proceedings and process for public input. *See id.* at 11; *Gressman* Application 22.

Both of the cases that Petitioners cite were decided after extensive evidentiary proceedings. In *Mellow*, the Court assigned a judge of the Commonwealth Court “as Master to conduct hearings” and issue a “report,” and, as a result, “three days of

hearings” were conducted “in the Commonwealth Court,” 607 A.2d at 206, resulting in a “Factual Analysis” subject to review in this Court, *id.* at 215. In *League of Women Voters*, this Court addressed remedial issues only after a liability trial had occurred in the Commonwealth Court (the case concerned “partisan gerrymandering,” not a decennial impasse), and this Court’s remedial ruling made it clear that “[t]he Remedial Plan is based upon the record developed in the Commonwealth Court.” *League of Women Voters*, 645 Pa. at 583, 181 A.3d at 1087. Here, however, Petitioners ask this Court to adopt a remedy (i.e., a new congressional redistricting plan that will be in place for the next decade) without evidentiary proceedings, either in the Commonwealth Court or this Court. Essentially, Petitioners request that this Court act as the map drawer and also the appellate court that reviews the legality of the adopted map. At a minimum, *this* request is untenable, unprecedented, and meritless.

To be sure, the *Mellow* decision signals that it is possible for this Court to exercise extraordinary jurisdiction in an impasse case and resolve evidentiary matters by resort to hearings before a special master (presumably, a Commonwealth Court judge) rather than through appellate review of a Commonwealth Court judgment. Although taking that approach is an *option*, the Court should decline to do so here. The difference between the options in terms of time to finality is marginal at most, since both options would entail the two steps of (1) evidentiary hearings in the

Commonwealth Court—whether before a “master” or a “judge”—and (2) subsequent briefing and argument in this Court.

And the Court’s interest in “promot[ing] confidence in the authority and integrity of our state and local institutions,” *Bd. of Revision of Taxes*, 607 Pa. at 122, 4 A.3d at 620, cuts in favor of respecting the traditional judicial process (on an expedited basis). On this point, it would be preferable for this Court to permit the Commonwealth Court to take evidence and issue findings and a judgment and, subsequently, exercise review as an appellate tribunal than to issue all findings itself after *de novo* review of a special master’s report. The former path would create two layers of review over the issues in this case and therefore afford disappointed litigants, and the public, recourse to an oversight process, which would highlight the integrity and fairness of the proceedings. Those values are essential to public faith in a redistricting process. By comparison, in an extraordinary-review process, the public would see this Court issue findings of fact and adopt a remedy and simultaneously declare those findings sound and the remedy lawful, leaving no room for additional oversight and review, except in the event of a colorable violation of federal law. Because it is almost certain that *someone* is bound to complain of any redistricting plan

adopted in any jurisdiction under any circumstances, interests of public confidence weigh against this approach.⁵

Denying the applications would also “conserve judicial resources,” *Morris*, 565 Pa. at 18, 771 A.2d at 731, by limiting this Court’s adjudication to those issues raised by the parties on appeal, after issues are narrowed in the Commonwealth Court. This approach would facilitate the narrowing of issues through trial-level litigation and the weeding out of issues that ultimately prove not to be material or worthy of this Court’s review. By contrast, folding both steps of adjudication into one process would, with or without a special master, make this Court responsible for resolving all disputes in the first instance, regardless of how material and difficult they prove to be.

Because Petitioners fail to acknowledge the need for evidentiary hearings, they are in no position to explain why evidentiary proceedings before a special master of the Commonwealth Court are preferable to evidentiary proceedings before a judge of the Commonwealth Court. And none is apparent. The *Mellow* decision did not address this question and appears not to have considered it. Therefore, contrary to what Petitioners suggest, it should not be read to establish that impasse cases must

⁵ One need not doubt the good faith of members of this Court to see that a process of oversight through ordinary appellate review enhances the appearance of fairness, due process, and integrity—which are all values underpinning the *League of Women Voters* decisions.

automatically be resolved in this Court's extraordinary jurisdiction. This is a differently composed Court, acting 30 years after *Mellow*, and is of course free to exercise its discretion in a different way, based on current circumstances and considerations.

CONCLUSION

The applications should be denied. Alternatively, if this Court exercises extraordinary jurisdiction, it should adopt a scheduling order that provides for public evidentiary proceedings directed through an appointed special master.

Dated: December 27, 2021

Respectfully submitted,

/s/ Anthony R. Holtzman

/s/ Jeffry Duffy

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** Pro Hac Vice application forthcoming*

Counsel for Proposed Intervenors Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives

CERTIFICATION OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Anthony R. Holtzman
Anthony R. Holtzman

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service by PACFile eService as follows:

All counsel of record

Date: December 27, 2021

/s/ Anthony R. Holtzman
Anthony R. Holtzman

Exhibit C

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 464 M.D. 2021

Carol Ann Carter; Monica Parrilla; Rebecca Poyourow; William Tung; Roseanne Milazzo; Burt Siegel; Susan Cassanelli; Lee Cassanelli; Lynn Wachman; Michael Guttman; Maya Fonkeu; Brady Hill; Mary Ellen Bachunis; Tom DeWall; Stephanie McNulty; and Janet Temin,

Petitioners,

vs.

Veronica Degraffenreid, in Her Capacity as Acting Secretary of the Commonwealth of Pennsylvania; and Jessica Mathis, in Her Capacity as Director of the Bureau of Election Services and Notaries,

Respondents.

No. 465 M.D. 2021

Philip T. Gressman; Ron Y. Donagi; Kristopher R. Tapp; Pamela A. Gorkin; David P. Marsh; James L. Rosenberger; Amy Myers; Eugene Boman; Gary Gordon; Liz McMahon; Timothy G. Feeman; and Garth Isaak

Petitioners,

vs.

Veronica Degraffenreid, in Her Capacity as Acting Secretary of the Commonwealth of Pennsylvania; and Jessica Mathis, in Her Capacity as Director of the Bureau of Election Services and Notaries,

Respondents.

**MEMORANDUM OF LAW IN SUPPORT OF APPLICATION FOR
LEAVE TO INTERVENE BY BRYAN CUTLER, SPEAKER OF THE
PENNSYLVANIA HOUSE OF REPRESENTATIVES; KERRY
BENNINGHOFF, MAJORITY LEADER OF THE PENNSYLVANIA
HOUSE OF REPRESENTATIVES; JAKE CORMAN, PRESIDENT PRO
TEMPORE OF THE PENNSYLVANIA SENATE; AND KIM WARD,
MAJORITY LEADER OF THE PENNSYLVANIA SENATE**

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** Pro Hac Vice application forthcoming*

*Counsel for Proposed-Intervenors Bryan
Cutler, Speaker of the Pennsylvania
House of Representatives, and Kerry
Benninghoff, Majority Leader of the
Pennsylvania House of Representatives*

Bryan Cutler, Speaker of the Pennsylvania House of Representatives (“Speaker Cutler”); Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives (“Leader Benninghoff” and, together with Speaker Cutler, the “House Leaders”); Jake Corman, President *Pro Tempore* of the Pennsylvania Senate (“President Corman”); Kim Ward, Majority Leader of the Pennsylvania Senate (“Leader Ward” and, together with President Corman, the “Senate Leaders,” and, together with the House Leaders, the “Proposed Intervenors”) hereby file this Memorandum of Law supporting their Application for Leave to Intervene in the above-captioned matters (“Application”), matters that were filed by Carol Ann Carter, *et al.* (“Carter Petitioners”) and Philip T. Gressman, *et al.* (“Gressman Petitioners”) (collectively, “Petitioners”).

The Proposed Intervenors satisfy the requirements for intervention under Pa.R.Civ.P. 2327 and, as members of the Pennsylvania General Assembly (the “General Assembly”) and leaders of the General Assembly as an institution, seek to protect their exclusive authority under Article I, Section 4 of the United States Constitution to prescribe the “Times, Places, and Manner” of congressional elections, and under the Pennsylvania Constitution to legislate and appropriate for elections in Pennsylvania. Petitioners’ requested relief would usurp this exclusive authority. Previously, in a nearly identical lawsuit that the Carter Petitioners filed in April 2021, in which they sought the same relief that they are seeking here,

Proposed Intervenors were granted leave to intervene, after which this Court dismissed the suit. As this Court stated in authorizing the intervention, “it seems clear that Legislators’ ability to legislate would be impaired if the Court imposes a deadline on the General Assembly and the Governor to put in place a new congressional district map and takes control of the redistricting process.” *Carter v. Degraffenreid*, No. 132 M.D. 2021 (Slip. Op. Sept. 2, 2021) at pg. 12 (copy attached as Appendix 1). The same point holds true now, and Proposed Intervenors should be permitted to intervene in both of these actions.

In support of their Application, the Proposed Intervenors respectfully state as follows:

I. BACKGROUND

1. The United States and Pennsylvania Constitutions vest the General Assembly with the authority to redistrict this Commonwealth’s congressional districts. Specifically, Article I, Section 4 of the United States Constitution (the “Elections Clause”) provides that “[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof....” Pursuant to the Elections Clause, as a matter of federal law, “redistricting is a legislative function, to be performed in accordance with the State’s prescriptions for lawmaking.” *Arizona State Legislature v. Arizona Indep.*

Redistricting Comm’n, 576 U.S. 787, 808 (2015). The Commonwealth’s legislative power is vested in the General Assembly. PA. CONST. ART. II, § 1.

2. Congressional districting plans are legislative enactments of the General Assembly, passed like any other legislation. The Pennsylvania Supreme Court has confirmed that the “primary responsibility and authority for drawing federal congressional legislative districts rests squarely with the state legislature.” *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 821–22 (Pa. 2018), citing *Butcher v. Bloom*, 216 A.2d 457, 458 (Pa. 1966) (identifying the General Assembly as “the organ of government with the primary responsibility for the task of apportionment”) and *Growe v. Emison*, 507 U.S. 25, 34 (1993) (“the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts”).

3. By statute, the Secretary of Commerce, on behalf of the United States Census Bureau, must deliver to the President of the United States the apportionment figures from the decennial census by December 31 of the year in which the Census is taken, and must deliver redistricting data (known as P.L. 94-171 data)¹ to the states by April 1 of the year after the year in which the Census is taken. 13 U.S.C. § 141.

¹ The redistricting data consists of population counts for every census block in each state as of the decennial census date (here, April 1, 2020). Apportionment numbers are simply statewide population counts and, unlike the granular redistricting data, offer no insight about how the population is distributed within the state.

Apportionment data is used to allocate U.S. House of Representatives seats to the states, and redistricting data is used by state legislatures or other state redistricting authorities to draw representational districts.

4. This year's Census results, however, were significantly delayed. The apportionment results were delivered on April 26, 2021, but the Census Bureau did not deliver the P.L. 94-171 data until August 12, 2021.²

5. Unlike with some other states, there is no express deadline set forth in Pennsylvania's Constitution or statutes by which the Commonwealth must enact a new congressional district plan following the publication of a new census. *Carter*, 132 M.D. 2021, at pg. 12.

6. There is indeed still time for the General Assembly and Governor to reach an agreement on a congressional redistricting plan. Candidates for congressional seats cannot begin collecting the signatures that they need in order to be placed on the ballot until February 15, 2022 – over 45 days from now. And, in the past, those nominating petition deadlines have been moved for Congressional elections, and therefore could still be moved in this election cycle. *See, e.g., Mellow v. Mitchell*, 607 A.2d 204, 237 & 244 (Pa. 1992) (adopting the “Revised Election Calendar attached to this Order as Appendix B,” which moved the first day to

² *See* <https://www.census.gov/data/datasets/2020/dec/2020-census-redistricting-summary-file-dataset.html> (last accessed December 22, 2021).

circulate and file nominating petitions from January 28 to March 10). Regardless, Proposed Intervenors certainly have an interest in any litigation that seeks to usurp their authority, especially when there is still time for the legislature to act, and even if, as Petitioners believe, the enactment of a redistricting plan is unlikely.

7. In *Mellow v. Mitchell*, the last case that involved an impasse like the one that Petitioners claim is certain to materialize here, the action was not filed until the first day when nominating petitions could be circulated. 607 A.2d at 205. Here, Petitioners' actions were filed over a month before the first day when nominating petitions can be circulated.

8. Speaker Cutler is a duly elected, qualified, and serving Member of the House of Representatives from the 100th House District, and is also the duly elected Speaker of the House of Representatives and in such capacity is the presiding officer of that body.

9. Leader Benninghoff is a duly elected, qualified, and serving Member of the House of Representatives from the 171st House District, and is also the duly elected Majority Leader of the House of Representatives and, in such capacity, leads the Republican Caucus of the House of Representatives (the "House Republican Caucus"). The House Republican Caucus consists of 113 out of 203 Members of the House.

10. President Corman is a duly elected, qualified, and serving Member of the Senate from the 34th Senatorial District, and is also the duly elected President *Pro Tempore* of the Senate. In such capacity, he is the highest-ranking officer of the Senate and presides over that body in the absence of the Lieutenant Governor. *See* Pa. Const. art. II, § 9.

11. Leader Ward is a duly elected, qualified, and serving Member of the Senate from the 39th Senatorial District, and is also the duly elected Majority Leader of the Senate and, in such capacity, leads the Republican Caucus of the Senate (the “Senate Republican Caucus”). The Senate Republican Caucus consists of 29 out of 48 Members of the Senate: 28 Republican Senators and 1 independent Senator who caucuses with the Republicans.

12. Attached to the Application as **Exhibits A and B**, respectively, are the Proposed Intervenors’ proposed Answers to the Petitions for Review.

II. THE PROPOSED INTERVENORS HAVE A RIGHT TO INTERVENE

13. Under Pennsylvania law, a person has an absolute right to intervene in an action if he falls within one of the categories enumerated in Pa.R.Civ.P. 2327. *See id.*; Pa.R.Civ.P. 2329; *see also Larock v. Sugarloaf Twp. Zoning Hearing Bd.*, 740 A.2d 308, 313 (Pa. Cmwlth. 1999).

14. The grant of intervention is mandatory where the intervenor meets any one of the four criteria set forth in Pa.R.Civ.P. 2327. *Larock*, 740 A.2d at 313 (“if

the petitioner is a person within one of the classes described in Rule 2327, the allowance of intervention is mandatory, not discretionary . . .”) (internal citations omitted).

15. Here, two independent bases exist to support the Proposed Intervenors’ right to intervene. First, Pa.R.Civ.P. 2327(3) provides that a person must be permitted to intervene if he “could have joined as an original party in the action or could have been joined therein.” *Id.* Second, Pa.R.Civ.P. 2327(4) provides that a person must be permitted to intervene if “the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.” *Id.*

16. Pennsylvania courts have established “that the inquiry to determine whether a party has standing to initiate litigation is different than the inquiry to determine whether a party can intervene in existing litigation.” *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283, 1288 (Pa. Cmwlth. 2019). Indeed, “[s]tanding to file a formal complaint requires the moving party to have a direct, immediate, and substantial interest in the subject matter of the controversy. . . . Conversely, a person seeking to intervene in a proceeding need have only an ‘interest of such nature that participation . . . may be in the public interest.’” *Id.* at 1288-1289 (citation omitted).

17. Moreover, the Proposed Intervenors are the presiding officers of both Houses of the General Assembly and seek to intervene to protect the official,

individual, and/or institutional interests described in this memorandum. As this Court held just last year, “there is a difference between personal standing and legislative standing,” and a legislator “may be able to initiate litigation in his legislative capacity, where the legislator can demonstrate an injury to his ability ‘to act as a legislator.’” *Allegheny Reprod. Health Ctr. v. Pennsylvania Dep’t of Human Servs.*, 225 A.3d 902, 909 (Pa. Cmwlth. 2020). These principles of legislative standing are relevant to whether a legally enforceable interest exists. *Id.* at 902.

18. This Court again recognized and re-affirmed these principles when it granted Proposed Intervenors’ request to intervene in the first lawsuit filed by the Carter Petitioners. *Carter*, 132 M.D. 2021, at pgs. 10-11.

19. Because the Proposed Intervenors have legally enforceable interests at play and could have been original parties to this case, they must be permitted to intervene as of right under both Pa.R.Civ.P. 2327 (3) and (4).

A. Determination of This Action Will Affect the Proposed Intervenors’ Enforceable Interest in Vindicating and Protecting Their Exclusive Interest and Right to Legislate Redistricting and Election Laws, which Petitioners Seek to Divest.

20. The Proposed Intervenors unquestionably have an enforceable interest in defending the constitutional authority of Pennsylvania’s legislative actors to prescribe the “Times, Places, and Manner of holding elections for Senators and Representatives,” U.S. CONST. ART. I, § 4, which includes the authority to enact congressional districting plans. *League of Women Voters*, 178 A.3d at 821–22. This

action seeks to dilute, abrogate, impair, or abolish that constitutional prerogative. Petitioners ask the Court to take control over the congressional redistricting process and impose unreasonable, restrictive deadlines on Proposed Intervenors' constitutional prerogative.

21. This enforceable interest satisfies Pa.R.Civ.P. 2327 and, accordingly, Proposed Intervenors have the right to intervene. Pennsylvania law affirms the exclusive authority of Pennsylvania's legislators to engage in congressional redistricting, and that authority lies at the heart of this case.

22. The Proposed Intervenors have an enforceable interest warranting intervention, and can "initiate litigation in [their] legislative capacity, where the legislator can demonstrate an injury to his ability 'to act as a legislator.'" *Allegheny Reprod. Health Ctr.*, 225 A.3d at 909 (citing *Sunoco Pipeline L.P.*, 217 A.3d at 1288).

23. In *Fumo v. City of Philadelphia*, the Pennsylvania Supreme Court determined that a city's issuance of a license for the construction of a casino on a Pennsylvania river invaded the General Assembly's exclusive authority to regulate submerged lands. 972 A.2d 487, 501–03 (Pa. 2009). In relevant part, the *Fumo* court held that six state legislators had legislative standing to "seek redress for an alleged usurpation of their authority as members of the General Assembly," to "vindicate a power that only the General Assembly has," and to "ask that this Court uphold their

right as legislators to cast a vote or otherwise make a decision on licensing the use of the Commonwealth's submerged lands." *Id.* at 502.

24. The Proposed Intervenors' Application presents a stronger case for intervention. Regulating the times, places, and manner of congressional elections in Pennsylvania—a task that includes redistricting legislation—is an exclusively legislative function, not only under Pennsylvania law, but also under the U.S. Constitution. *See, e.g.*, U.S. CONST. ART. I, § 4; PA. CONST. ART. II, § 1; *League of Women Voters*, 178 A.3d at 821–22; *Butcher*, 216 A.2d at 458; *Arizona State Legislature*, 576 U.S. at 808; *Grove*, 507 U.S. at 34.

25. The power to redistrict is part of the General Assembly's overall power to regulate elections. More than a century ago, the Pennsylvania Supreme Court acknowledged that "[t]he power to regulate elections is a legislative one, and has been exercised by the general assembly since the foundation of the government." *Winston v. Moore*, 91 A. 520, 522 (Pa. 1914) (citing *Patterson v. Barlow*, 60 Pa. 54, 75 (1869)). The primacy of the General Assembly in the area of elections is manifest. *See In re Guzzardi*, 99 A.3d 381, 386 (Pa. 2014) ("[s]ubject to constitutional limitations, the Pennsylvania General Assembly may require such practices and procedures as it may deem necessary to the orderly, fair, and efficient administration of public elections in Pennsylvania"). For that reason, "the judiciary should act with restraint, in the election arena, subordinate to express statutory directives." *Id.*

26. Here, as in their last lawsuit, the Carter Petitioners seek, in pertinent part, a declaratory judgment that the Commonwealth's current congressional district plan is unconstitutional, an injunction prohibiting Respondents from "implementing, enforcing, or giving any effect to" that plan, and this Court's "[a]dopt[ion] [of] a new congressional district plan that complies with Article I, Section 5 of the Pennsylvania Constitution; Article I, Section 2 of the U.S. Constitution; and 2 U.S.C. § 2." Carter Pet. at 18-19 (Prayer for Relief).

27. Similarly, the Gressman Petitioners seek a declaration that Pennsylvania's current congressional districts are unconstitutional and an order enjoining Respondents from "implementing, enforcing, or giving any effect to Pennsylvania's current congressional district plan in any future election." Gressman Pet. at 14 (Prayer for Relief). The Gressman Petitioners also seek "implementation of a new congressional district map with the correct number of congressional districts that adheres to the one-person, one-vote standard and all other applicable constitutional and legal requirements." Gressman Pet. ¶ 1. Both sets of Petitioners, in addition, have already asked the Pennsylvania Supreme Court to take extraordinary jurisdiction of these matters and set an expedited schedule, culminating in the court's adoption of a new congressional district map.

28. These requests directly seek to divest the Proposed Intervenors' exclusive authority to determine the times, places, and manner of holding

congressional elections under U.S. Const. Art. I, § 4, and to transfer that authority to the Judiciary.

29. As this Court expressly recognized in the Carter Petitioners' prior suit, "it seems clear that Legislators' ability to legislate would be impaired if the Court imposed a deadline on the General Assembly and the Governor to put in place a new congressional district map and takes control of the redistricting process." *Carter*, 132 M.D. 2021, at pg. 12. But here, once again, Petitioners are asking the Court to take precisely those actions.

30. In addition, in the Carter Petitioners' prior suit, this Court recognized that "Legislators would have a legally enforceable interest in the submission of a proposed plan for the Court's consideration if called upon to draw a new congressional map, as in the *Mellow* case." *Carter*, 132 M.D. 2021, at pg. 12. Nothing about that interest has changed in the last three months.

31. Thus, as previously recognized by this Court, determination of this action necessarily and directly affects the Proposed Intervenors' legally enforceable interests, giving them a right to intervene. *Fumo*, 972 A.2d at 502 ("the claim reflects the state legislators' interest in maintaining the effectiveness of their legislative authority and their vote, and for this reason, falls within the realm of the type of claim that legislators, qua legislators, have standing to pursue.").

B. The Proposed Intervenors Could Have Joined as an Original Party in the Action or Could Have Been Joined Herein.

32. Pennsylvania courts recognize that parties with special interests implicated by an action could have been joined as original parties. *See, e.g., Appeal of Denny Bldg. Corp.*, 127 A.2d 724, 729 (1956) (finding intervention appropriate when parties “have an obvious special interest apart from that of the general public which would certainly have justified their joining as original parties in the action”); *Harrington v. Philadelphia City Emps. Fed. Credit Union*, 364 A.2d 435, 441 (Pa. Super. 1976) (recognizing that candidates “could have been an original party or could have been joined in the action . . . [because they] had interests which would be drastically affected by the outcome of the equity action”).

33. Further, 42 Pa.C.S. § 7540(a) provides that “[w]hen declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding.”

34. The Proposed Intervenors, as the parties to whom the constitutional authority to redistrict has been assigned, have a special interest in these actions. The actions seek to divest—or, at a minimum, significantly impair—the Proposed Intervenors’ authority to conduct congressional redistricting for the Commonwealth for the 2022 elections and beyond.

35. Moreover, the Proposed Intervenors could have joined as original parties in these actions. In fact, it is not uncommon for the presiding officers of the House and Senate—like Speaker Cutler and President Corman—to be named as original parties in cases challenging the constitutionality of, and seeking to alter, redistricting plans enacted by the General Assembly. For example, in both *League of Women Voters* and *Erfer*, the then-presiding officers of the General Assembly were named as original parties, including former Speaker Mike Turzai and former President *Pro Tempore* Joseph Scarnati III in *League of Women Voters*, and former Speaker Matthew Ryan and then-Lieutenant Governor and President of the Senate Robert Jubelirer in *Erfer*. Further, in *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), an action brought to seek judicial intervention to draft a congressional districting plan when the General Assembly and Governor reached an impasse and failed to pass such a plan, the petitioners were eight Members of the Senate, who were therefore original parties. *Id.* at 205; *see also Carter*, 132 M.D. 2021, at pg. 12 (finding that “in *Mellow* were eight senators who sought nearly the same relief as sought here, and several members of the state House of Representatives and Senate were permitted to intervene”).³

³ Notably, *Mellow* was not filed until January 28, 1992, which was the first day on which nominating petitions for the U.S. House could begin circulating that year. 607 A.2d at 205.

36. The Proposed Intervenors could have joined as original parties in these actions, and, as these cases show, the General Assembly's presiding officers are typically joined in these types of cases. The instant actions seek declaratory judgments and injunctive relief that would impose improper restraints upon, and usurp, the exclusive domain of the General Assembly. If granted, the requested relief would directly impact the Proposed Intervenors' authority and interest as legislators and the official, institutional, and other interests that they are further authorized to represent. Therefore, the Proposed Intervenors are entitled to intervene here as a matter of right.

C. There Is No Other Reason for the Court to Deny the Application.

37. The Proposed Intervenors have shown an entitlement to intervene in these cases. Given this showing, Pa.R.Civ.P. 2329 provides only three reasons that could justify a refusal of intervention. None of them applies.

38. First, Pa.R.Civ.P. 2329(1) permits refusal of intervention if "the claim or defense of the petitioner is in subordination to and in recognition of the propriety of the action," which has been interpreted to mean that an "intervenor cannot question supported findings of fact made prior to the intervention" and that "an intervenor must take the suit as he finds it." *Com. ex rel. Chidsey v. Keystone Mut. Cas. Co.*, 76 A.2d 867, 870 (Pa. 1950). There are no subordination concerns here, given the early stage of this litigation.

39. Second, Pa.R.Civ.P. 2329(2) permits a court to refuse an application for intervention if “the interest of the petitioner is already adequately represented.” Here, Proposed Intervenors seek to vindicate rights and interests held by themselves and their members in their capacity as legislators. Their interests are not already adequately represented by the originally named Respondents in these cases, as those Respondents are simply responsible for election administration and do not possess the interest in drafting and passing congressional districting plans that Petitioners seek to impair or abrogate. *See Shapp*, 391 A.2d at 608 (holding that “[s]urely, the defense of legislation adopted by the General Assembly must be within the authority of its elected leaders”). After all, “an executive branch agency is simply not in a position to represent Proposed Intervenors’ interest in the exercise of legislative power under Article III of the Pennsylvania Constitution.” *Allegheny Reprod. Health Ctr.*, 225 A.3d at 913. Petitioners practically concede this point in alleging repeatedly that the divided Commonwealth government—where the legislative chambers are controlled by Republicans and the Governor is a Democrat—is categorically incapable of compromise. Petitioners cannot, after making this allegation, claim that the Democratic Secretary of State or the Director of Elections represents Proposed Intervenors’ interests.

40. Finally, Pa.R.Civ.P. 2329(3) permits a refusal of intervention where “the petitioner has unduly delayed in making application for intervention or the

intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.” No such concern exists here. The Proposed Intervenors filed their Application just ten days after the filing of the Petition and well before this Court’s scheduled deadline of December 31 to intervene. The Proposed Intervenors’ participation in this case will simplify this action and is necessary, as they will bring before the Court arguments and law that otherwise would not be present.

41. In summary, there is no basis for refusing the Proposed Intervenors’ request to intervene in these matters.

WHEREFORE, for the foregoing reasons, the Proposed Intervenors respectfully request that the Court grant their Application for Leave to Intervene and enter the proposed order attached to it as **Exhibit “C,”** thereby granting the Application.

Dated: December 27, 2021

Respectfully submitted,

/s/ Anthony R. Holtzman

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** Pro Hac Vice application forthcoming*

Counsel for Proposed-Intervenors Bryan Cutler, Speaker of the Pennsylvania House of Representatives, and Kerry Benninghoff, Majority Leader of the Pennsylvania House of Representatives

CERTIFICATION OF COMPLIANCE

I hereby certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

/s/ Anthony R. Holtzman
Anthony R. Holtzman

Appendix 1

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carol Ann Carter; Monica Parrilla; :
Rebecca Poyourow; William Tung; :
Roseanne Milazzo; Burt Siegel; :
Susan Cassanelli; Lee Cassanelli; :
Lynn Wachman; Michael Guttman; :
Maya Fonkeu; Brady Hill; Mary Ellen :
Balchunis; Tom DeWall; Stephanie :
McNulty; and Janet Temin, :

Petitioners :

v. :

No. 132 M.D. 2021
Held: August 24, 2021

Veronica Degraffenreid, in her official :
capacity as the Acting Secretary of :
the Commonwealth of Pennsylvania; :
Jessica Mathis, in her official :
capacity as Director for the :
Pennsylvania Bureau of Election :
Services and Notaries, :

Respondents :

BEFORE: HONORABLE MICHAEL H. WOJCIK, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE WOJCIK

Filed: September 2, 2021

Petitioners¹ filed a petition for review (Petition) addressed to this
Court's original jurisdiction. The Petition seeks, among other things, a
declaration

¹ Petitioners are Carol Ann Carter, Monica Parrilla, Rebecca Poyourow, William Tung, Roseanne Milazzo, Burt Siegel, Susan Cassanelli, Lee Cassanelli, Lynn Wachman, Michael

that the Commonwealth of Pennsylvania’s 2018 congressional district map is unconstitutional and may not be used for the 2022 election year. Currently, the Court considers three applications for leave to intervene. Speaker of the Pennsylvania House of Representatives Bryan Cutler; Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff; President Pro Tempore of the Pennsylvania Senate Jake Corman; and Majority Leader of the Pennsylvania Senate Kim Ward (collectively, Legislators) filed the first application for leave to intervene. The Republican Party of Pennsylvania and Individual Republican Voters² (collectively, Republican Party) filed the second application for leave to intervene, and Voters of the Commonwealth of Pennsylvania (Voters of Commonwealth)³ filed the third

Guttman, Maya Fonkeu; Brady Hill; Mary Ellen Balchunis, Tom DeWall, Stephanie McNulty, and Janet Temin. Each named petitioner is a United States citizen and registered voter in Pennsylvania and intends to advocate and vote for Democratic candidates. *Id.*

² The application for leave to intervene identifies the following individuals as proposed intervenors: Patricia K. Poprik, David Torres, Billy Lanzilotti, Nancy Becker, Michael D. Straw, James Depp, Joseph P. Vichot, Justin Behrens, Thomas Whitehead, Lee Becker, Louis Capozzi, Kirk Radanovic, Paul Nyman, James McGuire, Jr., Kristine L. Eng, Donna Cosmello, James Foreman, David Ball, James Vasilko, Lynne Ryan, Cynthia Kirk, Daryl Metcalfe, Luke Negron, Sue Ann Means, Reverend Todd Johnson, Michael Harvey, and Louisa Gaughen. *See Appl. for Leave to Intervene by Proposed Intervenors the Republican Party of Pennsylvania and Individual Republican Voters*, ¶¶ 2-28. The application provides each proposed intervenor’s congressional district number; any position within the Republican Party that he or she may hold or has held in the past; where applicable, an indication of whether the individual is considering running for public office; and the individual’s participation in the election process whether it be volunteering/advocating for a Republican candidate or intent to vote for Republican candidates.

³ “Voters of the Commonwealth of Pennsylvania” is not an organization but rather is used to generally refer to the named proposed intervenors in the application. The application is brought on behalf of Haroon Bashir, Vallerie Biancaniello, Debra A. Biro, Tegwyn Hughes, James D. Bee, Richard L. Lawson, David Dillon, Rico Timothy Elmore, Barbara Steinour, James Curtis Jarrett, Jeffrey Wenk, and Donald Beishl, Jr. *See Appl. for Leave to Intervene by Voters of the Commonwealth of Pennsylvania*, ¶¶ 10-21. The application identifies the voter by name, general area of residency and congressional district number, as well as the individual’s intention in voting in the 2022 elections. *Id.* Each allegation also indicates that the proposed intervenor voted for his/her General Assembly representatives with the expectation that the representatives would have the authority to enact a new congressional district map based on the 2020 Census data.

application. All proposed intervenors seek to be aligned with Respondents Veronica Degraffenreid, Acting Secretary of the Commonwealth of Pennsylvania, and Jessica Mathis, Director for the Pennsylvania Bureau of Election Services and Notaries (collectively, Secretary). Petitioners oppose all three applications, while the Secretary opposes only the applications of the Republican Party and Voters of Commonwealth. After hearing held August 24, 2021 and argument on the issue, we grant Legislators' application but deny the applications of the Republican Party and Voters of Commonwealth based on our conclusion that they lack a legally enforceable interest in the Petition and that they could not be named as original parties to the action.

I. Petition for Review

The Petition provides details regarding the results of the 2020 Census, the dates by which the United States (U.S.) Secretary of Commerce must provide the President of the United States and the states with the apportionment data, and the effect of the Covid-19 pandemic on the delivery of that data. The Petition further explains that, while the Commonwealth's population increased from the last decennial census, the 2020 Census shows that the Commonwealth will lose a representative seat in the U.S. House of Representatives. Starting with the upcoming 2022 elections, the Commonwealth will have 17 representatives in the House of Representatives, one fewer than the current 18 representatives. The Commonwealth's congressional district map must be redrawn to accommodate for the loss of a seat in the House of Representatives.

Petitioners claim that the Commonwealth's current congressional districts are malapportioned due to shifts in population within the Commonwealth.

They believe that the congressional districts in which they live are overpopulated, while other districts are underpopulated, and that, consequently, their votes for members of the U.S. House of Representatives are diluted.

The Petition observes that Pennsylvania law does not set a deadline by which a new congressional district map must be put in place prior to the first congressional election following a census. According to Petitioners, it is in the best interest of voters, candidates, and the Commonwealth's entire electoral apparatus to have a new, final congressional district map in place prior to February 15, 2022, the date on which candidates may begin collecting signatures for placement on the primary election ballot.

The Petition informs that the Commonwealth's current congressional district map was drawn by the Pennsylvania Supreme Court in *League of Women Voters of Pennsylvania v. Commonwealth*, 181 A.3d 1083 (Pa. 2018), after the Republican-controlled General Assembly and Democratic Governor failed to agree upon a new congressional district map following the Supreme Court's invalidation of the Commonwealth's 2011 congressional district map. The current political climate has not changed since 2018, as Republican representatives maintain the majority in both houses of the General Assembly and Governor Tom Wolf is a Democrat. For these reasons, Petitioners contend that it is unlikely that the "political branches" of the government will agree upon a new congressional district map.

Petitioners allege that the current congressional district map violates: (1) article I, section 5 of the Pennsylvania Constitution (free and equal elections

clause);⁴ (2) 2 U.S.C. §2c (relating to districting for House of Representatives);⁵ (3) article I, section 20 of the Pennsylvania Constitution (relating to right to petition);⁶ and (4) Article I, Section 2 of the U.S. Constitution (relating to qualifications for member of the House of Representatives).⁷ Petitioners seek a declaration that the

⁴ Article I, section 5 of the Pennsylvania Constitution, PA. CONST. art. I, § 5, states: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”

⁵ 2 U.S.C. §2c provides:

In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of section 2a(a) of this title, there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress).

⁶ Article I, section 20 of the Pennsylvania Constitution, PA. CONST. art. I, § 20, provides: “The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance.”

⁷ Article I, Section 2 of the U.S. Constitution, U.S. CONST. art. I, § 2, provides:

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.] The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and

Commonwealth's current congressional district map violates the above constitutional provisions; an injunction enjoining the Secretary, her agents, officers, employees, and successors from implementing, enforcing, or giving effect to the 2018 congressional district map; establishment of a schedule that will enable the Court to adopt and implement a new congressional district map by a date certain should the political branches fail to enact such a map by that time; implementation of a new congressional district map that complies with the U.S. and Pennsylvania Constitutions in the event that the political branches do not enact a new map by a date certain; an award of attorneys' fees, costs, and disbursements; and an award of any other relief the Court deems just and proper.

II. Applications for Leave to Intervene

A. Standards for Intervention

Although this matter was filed in the Court's original jurisdiction, the right to intervene is governed by Pennsylvania Rules of Civil Procedure Nos. 2326-

within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode-Island and Providence Plantations one, Connecticut five, New-York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

2350. Rule No. 2327, titled “Who May Intervene,” provides in relevant part and as asserted by the proposed intervenors:

At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if

....

(3) such person could have joined as an original party in the action or could have been joined therein; or

(4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action.

Pa. R.C.P. No. 2327.⁸

Rule No. 2329, titled “Action of Court on Petition,” declares:

Upon the filing of the petition and after hearing, of which due notice shall be given to all parties, the court, if the allegations of the petition have been established and are found to be sufficient, shall enter an order allowing intervention; but an application for intervention may be refused, if

(1) the claim or defense of the petitioner is not in subordination to and in recognition of the propriety of the action; or

(2) the interest of the petitioner is already adequately represented; or

⁸ Pursuant to Pennsylvania Rule of Civil Procedure No. 2328(a), the proposed intervenors attached to their respective applications for leave to intervene copies of the pleading that they would file if permitted to intervene. Each group of proposed intervenors would file preliminary objections to the Petition. Pa. R.C.P. No. 2328(a).

(3) the petitioner has unduly delayed in making application for intervention or the intervention will unduly delay, embarrass or prejudice the trial or the adjudication of the rights of the parties.

Pa. R.C.P. No. 2329.

The determination of whether a proposed intervenor has a “legally enforceable interest” calls for “a careful exercise of discretion and consideration of all the circumstances involved,” *Realen Valley Forge Greenes Associates v. Upper Merion Township Zoning Hearing Board*, 941 A.2d 739, 744 (Pa. Cmwlth. 2008) (citations omitted), because the exact boundaries of the “legally enforceable interest” limitation in Rule No. 2327(4) are not clear. *Id.* Nevertheless, an applicant for intervention must have some right, either legal or equitable, that will be affected by the proceedings. *See generally Keener v. Zoning Hearing Board of Millcreek Township*, 714 A.2d 1120, 1122 (Pa. Cmwlth. 1998).

At this point, it is important to note that although we summarize the applications for leave to intervene, the Court has considered the entirety of the applications and supporting briefs, the law cited therein, the replies to Petitioners’ and the Secretary’s opposition to the intervention applications, and the arguments, testimony and exhibits presented at the August 24, 2021 hearing in our determination of whether to grant intervention in this case.

B. Legislators’ Application

Legislators’ application for leave to intervene asserts that the named legislators are the highest-ranking members of their respective chambers, that the Republican Caucuses of their chambers have authorized them to seek intervention, and that the U.S. Constitution empowers the General Assembly to establish the time, place, and manner of elections to Congress, which includes the authority to redistrict.

See U.S. CONST. art. I, § 4 (stating that the time, place and manner of elections are left to the states' legislatures). Legislators seek to intervene pursuant to Pa. R.C.P. No. 2327(3) and (4) to vindicate their authority to redistrict the Commonwealth.

Legislators' memorandum in support of their application expands upon the reasons why they should be permitted to intervene. They first claim that they could have been named as original parties to the action or could have been joined therein because they have a special interest in the action.⁹ That special interest is Petitioners' alleged desire to divest Legislators of their constitutional authority to conduct congressional redistricting. Legislators also claim that their participation is required by the Declaratory Judgments Act,¹⁰ which mandates that all persons who have or claim any interest that would be affected by a declaration be made parties to the action, and that absent their participation, no declaration may prejudice their rights. 42 Pa. C.S. § 7540(a). Legislators also claim a legally enforceable interest in defending their constitutional authority to prescribe the time, place, and manner of holding elections, which includes the authority to enact congressional district maps. *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 576 U.S. 787, 808 (2015) ("redistricting is a legislative function, to be performed in

⁹ Legislators claim that they could have been joined as original parties because it is not uncommon for the courts to allow legislators to intervene in actions challenging the constitutionality of, or seeking to alter, redistricting plans. We reject such a blanket assertion. The cases upon which Legislators rely involved legislator participation *after* a redistricting plan was implemented and later challenged.

We also reject any reliance on *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283, 1288 (Pa. Cmwlth. 2019), as supporting the right to intervene based on a special interest. *Sunoco* addressed standing to *initiate* formal complaints before the Pennsylvania Public Utility Commission and did not directly involve the issue of intervention in formal complaint proceedings. Regardless, the Commission's regulations provide the standards upon which intervention may be granted. There is no statutory or regulatory law addressing intervention in cases such as the one currently before the Court.

¹⁰ 42 Pa. C.S. §§ 7531-7541.

accordance with the State's prescriptions for lawmaking . . ."). They claim that Petitioners asked the Court to take over this process even before the General Assembly has the necessary tools to redistrict and to impose unreasonable deadlines.

The law is well settled as to legislator standing when seeking to intervene. In *Markham v. Wolf*, 136 A.3d 134 (Pa. 2016), legislators sought to intervene in an action challenging an executive order that authorized direct care workers to organize. This Court denied the legislators' application for leave to intervene, which the Supreme Court affirmed. In doing so, the Supreme Court identified the requirements for legislator standing.

Standing exists only when the legislator's direct and substantial interest in his or her ability to participate in the voting process is negatively impacted, *see* [*Wilt v. Beal*, 363 A.2d 876 (Pa. Cmwlth. 1976)], or when he or she has suffered a concrete impairment or deprivation of an official power or authority to act as a legislator, *see* [*Fumo v. City of Philadelphia*, 972 A.2d 487 [Pa. 2009),] (finding standing due to alleged usurpation of legislators' authority to vote on licensing).

Conversely, a legislator lacks standing

where he or she has an indirect and less substantial interest in conduct outside the legislative forum which is unrelated to the voting or approval process, and akin to a general grievance about the correctness of governmental conduct, resulting in the standing requirements being unsatisfied.

Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services, 225 A.3d 902 (Pa. Cmwlth. 2020)¹¹ (quoting *Markham*, 136 A.3d at 145).

The Supreme Court has held that

members of the General Assembly have sufficient interest to participate in legal action in their official capacity and based upon their special status “where there [i]s a discernable and palpable infringement on their authority as legislators.” A legislator’s legal interest has been recognized “to protect [the] legislator’s right to vote on legislation” and “in actions alleging a diminution or deprivation of the legislator’s . . . power or authority.” But, a legislator has no legal interest “in actions seeking redress for a general grievance about the correctness of government conduct.”

Robinson Township v. Commonwealth, 84 A.3d 1054, 1054 (Pa. 2014) (alterations in original; citations omitted) (affirming Commonwealth Court order denying legislators intervention in action challenging constitutionality of amendments to the Oil and Gas Act¹²). The principles of legislator standing are therefore relevant to the issue of whether the putative intervenor has demonstrated the legally enforceable interest required of Pa. R.C.P. No. 2327(4).

We disagree with Petitioners’ claims that Legislators lack a legally enforceable interest in this matter because the Petition does not seek to deprive Legislators of their authority to redistrict the congressional district map and that

¹¹ The opinion appearing at 225 A.3d 902 (Pa. Cmwlth. 2020), addresses legislator standing. Thereafter, on March 26, 2021, the Court issued an order sustaining the respondents’ preliminary objections and dismissing the petition for review. The petitioners filed an appeal to the Supreme Court, which remains pending. *See Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services* (Pa. Cmwlth., No. 26 M.D. 2019, filed March 26, 2021), *appeal pending*, (Pa., No. 26 MAP 2021).

¹² 58 Pa. C.S. §§ 3201-3274.

Legislators are mischaracterizing the Petition as such. Among other things, the Petition seeks an order establishing a date certain by which the Court will take control of the redistricting process should the General Assembly and Governor fail to act. Pennsylvania law, however, does not establish a date by which a new congressional district map must be put in place. While Petitioners correctly cite *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992), for the proposition that there is nothing in the law prohibiting the court from establishing a deadline for enactment of a new congressional map, it is noteworthy that the petitioners in *Mellow* were eight senators who sought nearly the same relief as that sought here, and several members of the state House of Representatives and Senate were permitted to intervene. When the Supreme Court exercised plenary jurisdiction in *Mellow* and appointed a judge of this Court as master to conduct hearings and report to the Supreme Court, Judge Craig directed that the parties, including intervenors, submit their proposed congressional district plans by a date certain.

At this juncture, it is not known how the redistricting process will proceed. But it seems clear that Legislators' ability to legislate would be impaired if the Court imposes a deadline on the General Assembly and the Governor to put in place a new congressional district map and takes control of the redistricting process. Likewise, Legislators would have a legally enforceable interest in the submission of a proposed plan for the Court's consideration if called upon to draw a new congressional district map, as in the *Mellow* case.

We therefore grant Legislators' application for leave to intervene. They have a legally enforceable interest because Pennsylvania law does not prescribe the date by which a new congressional district map must be put in place and because they, as members of the General Assembly, have the constitutional authority to

establish the time, place, and manner of elections, which includes the authority to redistrict. *Arizona State Legislature*. Any potential infringement of that right may diminish or deprive Legislators of their ability to act as legislators.

C. Republican Party's Application and Voters of Commonwealth's Application

We next consider the applications for leave to intervene filed by the Republican Party and Voters of Commonwealth. Both applications claim that the Republican Party, including the individual Party Voters, and Voters of Commonwealth could have been named as original parties. We disagree. Clearly, the Republican Party, the individual Republican Voters, and Voters of Commonwealth could not be joined as petitioners because they oppose Petitioners' requested relief. Similarly, they could not be joined as respondents because Petitioners' claims do not affect their liabilities. *See* Pa. R.C.P. No. 2229(b) ("A [petitioner] may join as [respondents] persons against whom the [petitioner] asserts any right to relief . . . in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences if any common question of law or fact *affecting the liabilities of all such persons* will arise in the action.") (emphasis added).¹³ This factor militates against granting the Republican Party's and Voters of Commonwealth's applications for leave to intervene.

¹³ The Republican Party notes that the Court has permitted intervention in other cases, specifically *League of Women Voters v. Commonwealth*, 178 A.3d 737, 741 n.5 (Pa. 2018). There, the Supreme Court noted that a judge of this Court, acting as master, permitted certain Republican voters, who included announced or potential candidates for Congress and other active members of the Republican Party, to intervene. The Court did not state the basis upon which intervention was granted, and our review of this Court's docket in *League of Women Voters* (Pa. Cmwlth., No. 261 M.D. 2017), indicates that the Court's order did not set forth its reasons for granting intervention.

We now address whether the Voters of Commonwealth or the Republican Party has shown a legally enforceable interest. For its part, the Voters of Commonwealth claim that they seek to intervene to preserve the existing framework that the General Assembly and Governor have until the first day to circulate nomination petitions to implement a new congressional district map. They claim that they are “mirror images” of Petitioners because they intend to advocate on behalf of Republican candidates in 2022. Voters of Commonwealth suggest that if the Court grants Petitioners the relief requested, such relief would curtail the ability of the Republican-controlled General Assembly to represent their interests. This would diminish or nullify their votes and would take away local officials’ constitutional duty to redistrict the Commonwealth. Local officials are more familiar with their constituents than Supreme Court jurists.

Voters of Commonwealth suggest that they have a special interest that allows them to intervene, that being that this matter may be of public interest. They allege an inalienable right to express and present their concerns regarding drawing of the congressional district map, and if this Court imposes a date certain by which the political branches must act or takes over the redistricting process, the General Assembly will be divested of its authority to draw the new map.¹⁴ A court drawing

¹⁴ The Court admitted Voters of Commonwealth Exhibit 1, which contains the Affidavits of Tegwyn Hughes, Debra A. Biro, James Curtis Jarrett, James D. Bee, and Jeffrey Wenk, subject to Petitioners’ and the Secretary’s objections to the legal conclusions stated within the affidavits. The Affidavits largely echo the averments in the application for leave to intervene and are uniform for the most part. The affiants attest to their residency, registration as qualified electors in the Commonwealth, regularity in voting, voting with the expectation that their representatives would engage in the redistricting process based on the 2020 Census and ability to contact their representatives, and their intention in contacting their representatives relating to the new congressional district map. Each affiant states that he/she has an interest in the contours of his/her congressional districts and an inalienable right to express to his/her representatives concerns regarding redistricting under the First Amendment, U.S. CONST. amend. I. Further, affiants state that the Secretary does not have authority regarding redistricting and therefore does not represent the affiants’ interest.

the congressional district map will turn a legislative process into a judicial one, according to Voters of Commonwealth. Finally, newly enacted redistricting maps have been subject to voter challenges.

As for a legally enforceable interest, the Republican Party argues that it has an interest in expanding its power within the Commonwealth government and that redistricting is fundamentally about political power. It maintains that it has a legally enforceable interest in (1) the allocation of its resources, (2) advocating for its interest and that of its members in areas that are bipartisan, (3) who draws the new congressional district map, that being the Republican-controlled General

They conclude that they have a substantial and particularized interest in preserving the existing framework that the General Assembly and the Governor have until the first day to circulate nomination petitions to implement a new district plan. Petitioners' requested relief would deprive them of their ability to contact their legislators regarding redistricting, thus nullifying their vote for a representative. Further, Petitioners' request that the Court invalidate the current congressional map would deprive affiants of their right to representation should a special election be needed in their district.

The Court also permitted Voters of Commonwealth to provide an additional exhibit after the proceedings, which Voters filed on August 26, 2021. Voters filed a supplemental affidavit in support of the Voters' application for leave to intervene by Vallerie Biancaniello. The affidavit is the same as those presented in Voters of Commonwealth Exhibit 1. The Secretary promptly responded, indicating that she does not object to the affidavit on hearsay grounds or the Court's consideration of the affidavit in lieu of live testimony, but she does object to the legal conclusions stated therein. Petitioners object on the same basis as the Secretary.

Upon review, we sustain the objections to the legal conclusions stated within each affidavit, including that: (1) the affiant has a substantial and particularized interest in preserving the existing framework; (2) the requested relief would have the effect of preventing the affiant from being able to interact with the elected representatives regarding redistricting and nullifies the affiants' votes in the 2020 election; (3) if the Court grants the requested relief, the General Assembly will be deprived of its authority to draw new congressional districts and deprive the affiant of his/her ability to provide input to his/her representative thus infringing on the affiant's free speech rights; (4) the affiants' votes would be nullified and their interests of having their representatives exercise their full scope of constitutional duties with respect to redistricting would be infringed; and (5) the affiants could be deprived of their right to representation if the current map is declared unconstitutional and a special election must take place before a new map is enacted. In sustaining the objections to the Exhibits, we did not consider the stated conclusions in our disposition of this matter.

Assembly or the Justices of the Supreme Court, who are mostly Democrats, (4) a change in the environment in how rival parties defend their concrete interests, (5) recruiting of candidates, (6) risk of confusion to voters, and (7) associational interests.¹⁵ *See* PA. CONST. art. I, § 20 (“The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested

¹⁵ The Republican Party presented the testimony of Angela Alleman, Executive Director of the Pennsylvania GOP. Mrs. Alleman oversees all operations of the Party. She explained her concerns if the Supreme Court draws the congressional district map, including the removal of power to do so by the General Assembly, the Party’s ability to work with its legislators to influence the map but inability to advocate before the Supreme Court, and the Party’s diversion of funds to have experts prepare and analyze any map drawn by the Supreme Court. She believes that it is unfair to create a deadline for the General Assembly to act, especially when it is not clear when the 2020 Census data will be available. Mrs. Alleman stated that the uncertainty of the congressional district map affects candidate recruitment and makes it impossible for incumbents to know whether their districts will be realigned and the possibility that if realigned, whether the incumbent will be running against another incumbent. She acknowledged that regardless of who draws the new congressional district map, the Republican Party will have to spend money to educate voters, and for “get out and vote” campaigns. Mrs. Alleman agreed that Republican Party members may speak to their legislators regardless of who draws the map, and that the Republican Party has no power to make the General Assembly do what the Party wants. For Mrs. Alleman, the issue with the Petition is the request for a deadline by which the General Assembly and Governor must act and the allocation of the Party’s resources depending on who draws the congressional district map. She believes that if the General Assembly draws the map, the Republican legislators will negotiate the best possible map for the Party. Expenses the Republican Party would incur if the Supreme Court draws the map include legal fees, including fees for intervening in this action, expert fees for analyzing and preparing maps, and the diversion of the Party’s resources. The Court finds Mrs. Alleman’s testimony credible but not persuasive on the issue of whether the Republican Party has a legally enforceable interest.

The Court admitted 12 affidavits of the individual Republican Party members: Nancy Becker, James Depp, Thomas Whitehead, Louis Capozzi, Kirk Radanovic, Kristine L. Eng, David Ball, James Vaillko, Daryl Metcalfe, Sue Ann Means, and Michael Harvey, and Justin Behrens. The affidavits are substantially the same and attest that the affiant is a U.S. citizen and registered voter in Pennsylvania; the district in which the affiant resides; the affiant’s participation in the election-related/Republican Party activities; the affiant is a long-time supporter of the Republican party; and that Petitioners’ and the Secretary are affiliated with the affiant’s political opponents, and that, therefore, they will not advocate for a congressional district map that represents the affiant’s interest as a supporter and/or official of the Republican Party. The affidavits also attest to the affiant’s resources invested in advocating on behalf of the Republican Party, including activities that may be affected by the Supreme Court’s drawing of the congressional district map.

with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance.”).

First, the Court rejects the Voters of Commonwealth and the Republican Party’s argument that because they have a special interest in the matter, they are permitted to intervene. Both proposed intervenors rely on *Sunoco Pipeline L.P. v. Dinniman*, 217 A.3d 1283 (Pa. Cmwlth. 2019), but in that case, the primary issue was whether a senator had standing, either as a legislator or as a private citizen, to initiate a formal complaint with the Pennsylvania Public Utility Commission; the question of intervention was not at issue in *Sunoco*. The brief discussion of intervention was limited to distinguishing between standing to initiate a formal complaint and standing to intervene, which the Commission’s regulations expressly address. Years ago, in *Application of Biester*, 409 A.2d 848 (Pa. 1979), our Supreme Court established the standards for intervention. In *Biester*, a taxpayer sought to intervene in an action seeking to impanel a statewide investigative grand jury. The Court, after initially allowing the taxpayer to intervene, later vacated its order granting intervention. The Court determined that to intervene, the taxpayer must meet the “substantial, direct, and immediate” test set forth in *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 346 A.2d 269 (Pa. 1975). That standard remains the law in this Commonwealth. *Markham*, 136 A.3d at 139 (“in order to intervene, individuals must have standing, Pa. R.C.P. [No.] 2327(3), (4), and to establish standing, one must have an interest that is substantial, direct[,] and immediate”). To have a substantial interest, the proposed intervenor’s concern in the outcome of the action must surpass “the common interest of all citizens in procuring obedience to the law.” *Markham*, 136 A.3d at 140. An interest is direct if the matter will cause

harm to the party's interest, and the concern is immediate "if that causal connection is not remote or speculative." *Id.*

We conclude that the Voters of Commonwealth and individual Republican Voters fail to meet the "substantial, direct, and immediate" test. Neither the individual Republican Voters, regardless of political interest, or Voters of Commonwealth have an interest that surpasses the interest of all qualified and registered voters in the Commonwealth. Based on the preliminary 2020 Census data, the Commonwealth will lose a seat in the U.S. House of Representatives and thus our current congressional district map must be redrawn. As counsel for Voters of Commonwealth stated, the current congressional district map is malapportioned across the state. *Every elector*, therefore, has an interest in redrawing a congressional district map that meets constitutional standards. Thus, the individual Republican Voters and Voters of Commonwealth do not have a substantial interest that surpasses the common interest of all citizens.¹⁶

The Republican Party, identified as non-profit organization, has no legally enforceable interest either. Based on our review, it appears that the Republican Party is complaining about what role it may play in the redistricting process, a role that is not protected by law. Redistricting, however, is fundamentally about protecting the one-person one-vote principle, that is, all votes have equal power as near as possible. *See Gray v. Sanders*, 372 U.S. 368, 381 (1963); *Holt v. 2011 Legislative Reapportionment Commission*, 38 A.3d 711, 739 (Pa. 2012). The

¹⁶ We further disagree that Voters of Commonwealth are the "mirror image" of Petitioners because they will advocate for Republican candidates in 2022, whereas, Petitioners allege, they will advocate for Democratic candidates. Petitioners allege that the congressional districts in which they live are overpopulated as evidenced by the 2020 Census and, thus, their voting power is diluted. *See Voters of Commonwealth, Appl. for Leave to Intervene*, ¶¶ 10-21. Voters of Commonwealth do not speculate how their congressional districts may be affected by redistricting.

activities of the Republican Party, and how the Party allocates its resources, do not constitute a legally enforceable interest in how the congressional district map is determined and by whom. The case law cited by the Republican Party does not stand for the proposition that the asserted interests constitute legally enforceable interests sufficient to confer standing to intervene. The case law cited by the Secretary, rather, suggests otherwise and is more persuasive. *Cf. Gill v. Whitford*, 138 S. Ct. 1916, 1932 (2018) (recognizing that under the U.S. Supreme Court’s precedent, achieving a party majority in the legislature is a collective political interest, not an individual legal interest recognized by law); *see also Pennsylvania Voters Alliance v. Centre County*, 496 F. Supp. 3d 861, 868 (M.D. Pa. 2020) (recognizing that “‘statewide harm’ to a voter’s interest in ‘collective representation in the legislature’” or “in ‘influencing the legislature’s overall composition and policymaking’” is insufficient to support standing under Article III of the U.S. Constitution, U.S. CONST. art. III; “[t]o the extent that the latter interest is recognized, it is ‘embodied in [an individual’s] right to vote for [his or her] representative’”) (quoting *Gill*, 138 S. Ct. at 1931); *Erfer v. Commonwealth*, 794 A.2d 325, 330 (Pa. 2002) (recognizing that Democratic committee lacked standing to challenge reapportionment plan because it was not an entity authorized to exercise the right to vote), *abrogated on other grounds by League of Women Voters*, 178 A.3d 737.

Moreover, we conclude that the Republican Party’s, individual Republican Voters,’ and Voters of Commonwealth’s claimed interests are speculative and not immediate. The U.S. Census Bureau has released the redistricting data to the states, with the final redistricting data toolkit to be delivered by September 30, 2021. *See* <https://www.census.gov/programs-surveys/decennial-census/decade/2020/2020-census-results.html> (last visited August 30, 2021).

Therefore, our General Assembly can begin the process of moving forward with a new congressional district plan based on the Census data received. There is nothing preventing the Voters of Commonwealth, the individual Republican Voters, and the Republican Party from exercising their First Amendment and associational rights to make their positions known to their respective legislators.

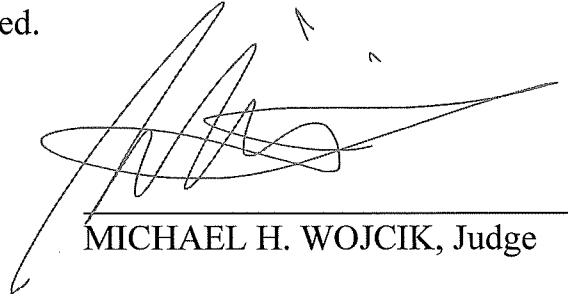
Because we conclude that the Republican Party, the individual Republican Voters, and Voters of Commonwealth have failed to show that they have legally enforceable interests in these proceedings, we deny their applications for leave to intervene.

III. Conclusion

The General Assembly and the Governor are vested with authority to draw a new congressional district map. Pennsylvania law, however, does not provide a date by which they must act. The relief that Petitioners seek, the setting of a deadline by which the political branches must act, or taking control of the redistricting process, potentially infringes upon that authority. Accordingly, Legislators have shown a legally enforceable interest entitling them to intervene in this matter. *Markham; Allegheny Reproductive Health Center*; Pa. R.C.P. No. 2327(4).

Conversely, the Republican Party and Voters of Commonwealth have failed to demonstrate that they could be joined as original parties to the action or that they have a legally enforceable interest that would entitle them to intervene in this matter. Pa. R.C.P. No. 2327(3), (4).

Accordingly, the application for leave to intervene filed by Legislators is granted, and the applications for leave to intervene filed by the Republican Party and Voters of Commonwealth are denied.



MICHAEL H. WOJCIK, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Carol Ann Carter; Monica Parrilla; :
Rebecca Poyourow; William Tung; :
Roseanne Milazzo; Burt Siegel; :
Susan Cassanelli; Lee Cassanelli; :
Lynn Wachman; Michael Guttman; :
Maya Fonkeu; Brady Hill; Mary Ellen :
Balchunis; Tom DeWall; Stephanie :
McNulty; and Janet Temin, :

Petitioners :

v. :

No. 132 M.D. 2021

Veronica Degraffenreid, in her official :
capacity as the Acting Secretary of :
the Commonwealth of Pennsylvania; :
Jessica Mathis, in her official :
capacity as Director for the :
Pennsylvania Bureau of Election :
Services and Notaries, :

Respondents :

ORDER

NOW 2nd day of September, 2021, upon consideration of the Applications for Leave to Intervene filed on behalf of (1) Speaker of the Pennsylvania House of Representatives Bryan Cutler, Majority Leader of the Pennsylvania House of Representatives Kerry Benninghoff, President Pro Tempore of the Pennsylvania Senate Jake Corman, and Majority Leader of the Pennsylvania Senate Kim Ward (collectively, Legislators); (2) the Republican Party of Pennsylvania and Individual Republican Voters (collectively, Republican Party); and (3) Voters of the

Commonwealth of Pennsylvania (Voters of Commonwealth), and after hearing and argument on the issue, it is hereby ordered as follows.

Legislators' Application for Leave to Intervene is **GRANTED**. The Prothonotary shall accept for filing Legislators' Preliminary Objections to the Petition for Review, attached to Legislators' June 1, 2021 Application for Leave to Intervene.

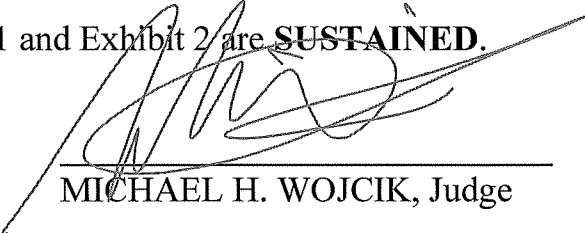
Respondents¹ shall file and serve their brief in support of their preliminary objections (4 copies) within 14 days of the exit date of this order.

Legislators shall file and serve their brief in support of their preliminary objections (4 copies) within 14 days of the exit date of this order. Petitioners shall file and serve their brief in opposition to Legislators' preliminary objections within 14 days of service of Legislators' brief. Upon completion of the briefing schedule, the Prothonotary shall list the preliminary objections on the appropriate argument list.

The Applications for Leave to Intervene filed by the Republican Party and the Voters of the Commonwealth are **DENIED**. The Republican Party's Application for Extraordinary Relief, attached to its Application for Leave to Intervene, is **DISMISSED AS MOOT**.

¹ Although Respondents filed preliminary objections, it appears that they have not filed their brief in support thereof. Petitioners, however, filed their brief in opposition to Respondents' preliminary objections on August 2, 2021.

Voters of the Commonwealth Exhibits 1 and 2 are admitted to the record. Petitioners' and Respondents' objections to the legal conclusions in the Voters of the Commonwealth's Exhibit 1 and Exhibit 2 are **SUSTAINED**.



MICHAEL H. WOJCIK, Judge

CERTIFICATE OF SERVICE

I hereby certify that I am this day serving the foregoing document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa.R.A.P. 121:

Service by PACFile eService as follows:

All counsel of record

Date: December 27, 2021

/s/ Anthony R. Holtzman
Anthony R. Holtzman

Exhibit D

IN THE SUPREME COURT OF PENNSYLVANIA

No. 7 MM 2022

CAROL ANN CARTER *et al.*,
Petitioners,

v.

LEIGH M. CHAPMAN, *et al.*,
Respondents.

**RESPONDENTS' EXCEPTIONS REGARDING
THE SPECIAL MASTER'S PROPOSED REVISION TO THE
2022 ELECTION CALENDAR/SCHEDULE AND
INCORPORATED BRIEF IN SUPPORT THEREOF**

On Review of the Special Master's Proposed Findings of Fact and
Conclusions of Law, Nos. 464 M.D. 2021 and 465 M.D. 2021 (February 7, 2022)

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(additional counsel on signature page)

Respondents, the Acting Secretary of the Commonwealth and Director of the Bureau of Election Services and Notaries, respectfully submit these Exceptions to the Special Master's proposed revision to the 2022 election calendar. In support of these Exceptions, the Respondents submit and attach hereto the Affidavit of Jonathan Marks dated February 14, 2022 ("Marks II Aff.").

The Secretary of the Commonwealth is Pennsylvania's chief election official, and Respondents are both election administrators charged with ensuring that Pennsylvania's elections are conducted in a fair, lawful, and orderly manner. Thus, in this litigation, Respondents' roles are two-fold: (1) to provide the Court with information where necessary; and (2) to minimize disruption of the 2022 elections by keeping the Court and the other parties apprised of election schedules and potential alterations to those schedules.¹ In keeping with those roles, Respondents respectfully submit these Exceptions to assist the Court in determining what changes to the 2022 election calendar are feasible and necessary based on the existence of other deadlines and the demands of election administration.

Although the Special Master's February 7, 2022 Report recommended certain changes to the election calendar for the congressional primary election, the

¹ Respondents note that, although they have not proposed a congressional district plan in this litigation, Intervenor-Respondent Governor Wolf has proposed a plan for judicial adoption.

Report expressly “recognize[d]” that, “in light of the changed circumstances of this litigation prompted by [this] Court’s February 2, 2022 order, granting Petitioners’ Emergency Application for Extraordinary Relief and invoking its extraordinary jurisdiction, ... further and/or different changes to the election calendar ... may be necessary.”² Respondents agree that further changes are necessary and appropriate. In particular, the Special Master’s Report did not address the calendar for the statewide and state legislative elections. For the reasons discussed herein, Respondents respectfully request that this Court address the calendar for all primary elections at this time.

In summary, despite delays in the redistricting process for both congressional and state legislative elections, Respondents believe that it is feasible—and highly preferable—to conduct the primary election for all races on the currently scheduled date of May 17, 2022.

Given recent experience, there appears to be a substantial possibility that a state-court decision moving the date of the primary election for a federal office would be challenged under the Elections Clause, *see* U.S. CONST. art. I, § 4, cl. 1.³

² The Honorable Patricia A. McCullough, Report Containing Proposed Findings of Fact and Conclusions of Law Supporting Recommendation of Congressional Redistricting Plan and Proposed Revision to the 2022 Election Calendar Schedule at 222 (Feb. 7, 2022).

³ In *Pennsylvania Democratic Party v. Boockvar*, 283 A.3d 345 (Pa. 2020), at least one of the parties and counsel to the present proceeding (the “Present Participants”) filed an Elections Clause challenge to this Court’s decision to extend, by only three days, the statutory “received-

Irrespective of the merits and ultimate resolution of such litigation, its pendency would inject uncertainty into an election cycle that is already quite challenging for both election administrators and candidates.

Further, keeping the congressional primary on May 17 but changing the primary date for state legislative offices, *i.e.*, having separate primaries, would likely cause voter confusion, depress voter participation, and cost taxpayers tens of millions of dollars. It would also present county election offices with significant logistical challenges, including the recruitment of poll workers. Respondents believe that the county boards of elections, which are responsible for directly administering elections, would also like to avoid having two separate primary dates.

In Section II.A and B below, Respondents provide a proposed election calendar (one for the statewide and congressional elections, and another for the

by” deadline for mail-in ballots. The Court’s Order was based on its determination that enforcing the statutory deadline in the extraordinary circumstances of the 2020 general election—which took place during the height of the COVID-19 pandemic and was beset for mail delays—would disenfranchise voters in violation of the Pennsylvania Constitution’s Free and Equal Elections Clause. *Id.* at 369. Nonetheless, the Present Participants asked the Supreme Court of the United States to reverse this Court’s Order, contending that the Order violated the Elections Clause. *See* Emergency Application for a Stay Pending the Filing and Disposition of a Petition for a Writ of Certiorari, *Scarnati v. Pa. Democratic Party*, No. 20A53 (U.S. filed Sept. 28, 2020); Emergency Application for a Stay Pending Disposition of a Petition for a Writ of Certiorari, *Pa. Democratic Party v. Boockvar*, No. 20A54 (U.S. filed Sept. 28, 2020); *see also* *Scarnati v. Boockvar*, 141 S. Ct. 644 (U.S.) (denying application to stay this Court’s Order by a 4-4 vote); *Republican Party of Pa. v. Boockvar*, 141 S. Ct. 643 (same).

state legislative election) that would allow the primary election for all races to be held on May 17, 2022.

I. THE CURRENT ELECTION SCHEDULE

The current election schedule stands as follows:

Event	Deadline
The first day before the primary election to circulate and file nomination petitions (<i>see</i> 25 P.S. § 2868).	February 15, 2022
The last day before the primary election to circulate and file nomination petitions (<i>see</i> 25 P.S. § 2868).	March 8, 2022
The first day before the primary election to circulate and file nomination papers (<i>see</i> 25 P.S. § 2913(b)).	March 9, 2022
Deadline to file objections to nomination petitions (<i>see</i> 25 P.S. § 2937).	March 15, 2022
Last day that may be fixed by the Commonwealth Court for hearings on objections that have been filed to nomination petitions (<i>see</i> 25 P.S. § 2937).	March 18, 2022
The last day before the primary election for candidates who filed nomination petitions to withdraw their candidacy (<i>see</i> 25 P.S. § 2874).	March 23, 2022
Last day for the Commonwealth Court to render decisions in cases involving objections to nomination petitions (<i>see</i> 25 P.S. § 2937).	March 23, 2022
The last day before the primary election for the County Board of Elections to send remote military-overseas absentee ballots (<i>see</i> 25 Pa.C.S. § 3508(b)(1)).	March 28, 2022
The last day before the primary election for the County Board of Elections to send all remaining military-overseas absentee ballots (<i>see</i> 25 Pa.C.S. § 3508(a)(1); 52 U.S.C. § 20302(a)(8)(A)).	April 1/2, 2022 ⁴

⁴ Under state law, if this deadline falls on a Saturday, as it does this election cycle, the deadline is moved to the proceeding day. 25 Pa.C.S. § 3508(a)(1). Federal law does not have a similar rule, and the deadline stays the same even if it falls on the weekend. 52 U.S.C. § 20302(a)(8)(A). This means that under state law, the last day before the primary election for the County Board of Elections to send all remaining military-overseas absentee ballots is April 1, while the deadline under federal law is April 2.

Event	Deadline
The last day before the primary election for voters to register (<i>see</i> 25 P.S. § 3071).	May 2, 2022
The last day before the primary election to apply for a mail-in or civilian absentee ballot (<i>see</i> 25 P.S. § 3146.2a(a)).	May 10, 2022
The last day for County Boards of Elections to receive voted mail-in and civilian absentee ballots for the primary election (<i>see</i> 25 P.S. § 3146.6(a)).	May 17, 2022
Pennsylvania’s 2022 general primary election (<i>see</i> 25 P.S. § 2753(a)).	May 17, 2022
The last day for County Boards of Elections to receive voted military-overseas ballots for the primary election for the primary election (<i>see</i> 25 Pa.C.S. § 3511(a)).	May 24, 2022

II. PROPOSED MODIFICATIONS TO THE CURRENT ELECTION CALENDAR WITH MAY 17 PRIMARY

A. Proposed Modified Statewide and Congressional Calendar

Through a combination of internal administrative adjustments and Court-ordered date changes, it is possible to hold the statewide and congressional primaries on the scheduled May 17, 2022 date.

The current election schedule gives the Counties ten weeks to prepare for the primary election, between (1) the last date before the primary election for circulating and filing nomination petitions (currently March 8), and (2) the primary election date (May 17). Respondents believe that the Counties could fully prepare for the statewide and congressional primary elections in nine weeks.

To accommodate this slightly compressed schedule, the Court would need to order a period for circulating and filing nomination petitions that lasted two weeks,

instead of three; and the nominations period would need to start on March 1, spanning two weeks and ending on the recommended revised deadline of March 15. The Department and county boards of elections have typically had three weeks of preparation time before the first date for circulating and filing nomination petitions. During this period, the Department would update the Department's Elections and Campaign Finance system, and the counties would update the Statewide Uniform Registry of Electors ("SURE") system, to reflect the new districts.⁵ The Department previously represented that with the addition of staff and increased staff hours, it would be possible for the Department to complete its preparations in two weeks instead of three.⁶ Upon further review, the Department believes that, by using generic nomination petitions,⁷ the Department could complete its preparations for circulating and filing nomination petitions quickly

⁵ See Affidavit of Jonathan Marks ("Marks I Aff.") ¶ 15 (Jan. 28, 2022), which was admitted into evidence at the hearing conducted by the Special Master in this proceeding on January 27-28, 2022.

⁶ See *id.* ¶ 16.

⁷ Ideally, the Department and county boards of elections would have an opportunity, before the circulation and filing of nomination petitions begin, to fully update the Statewide Uniform Registry of Electors (SURE) system with information about the new districts. In that event, the computerized tool used to generate nomination petitions would allow candidates to pre-populate all the information needed on the Candidate's Affidavit, as well as the information needed in the preamble portion of the nomination petition page, based on the specific office the candidate is seeking. By contrast, with generic nomination petitions, candidates running in particular districts must manually fill in the District Number line on the Candidate's Affidavit and the District Number line and County of Signers lines at the top of each nomination petition page. These two lines will be blank when the petition forms are generated and printed. Nonetheless, the computerized tool used to generate the generic nomination petitions will still pre-populate the rest of the information for the candidate's review.

and in only a couple of days, by March 1, 2022. Although the use of generic nomination petitions is less than ideal, *see supra* note 6, it will allow for the election process to proceed in a timely manner, as necessitated under the unusual circumstances of the current election cycle.

Accordingly, if the first date for circulating and filing nomination petitions were moved from February 15 to March 1, the Department would need to have a final congressional plan in place by no later than **February 27, 2022**. However, the Department respectfully requests that the Court issue an Order establishing the calendar deadlines as early as possible, and before February 27, 2022, so that counties, candidates, and the Department have time to prepare for the commencement of petition filing.

The below chart illustrates the modifications proposed to the calendar for the statewide and congressional elections:

Event	Current Deadline for Statewide and Congressional Elections	Proposed Modified Deadline for Statewide and Congressional Elections
First day to circulate and file nomination petitions	February 15, 2022	<u>March 1, 2022</u>
Last day to circulate and file nomination petitions	March 8, 2022 <i>(three-week period for circulating and filing nomination petitions)</i>	<u>March 15, 2022</u> <i>(<u>two-week</u> period for circulating and filing nomination petitions)</i>
First day to circulate and file nomination papers	March 9, 2022	March 16, 2022

Event	Current Deadline for Statewide and Congressional Elections	Proposed Modified Deadline for Statewide and Congressional Elections
Deadline to file objections to nomination petitions	March 15, 2022 <i>(objections must be filed within 7 days)</i>	March 22, 2022
Last day that may be fixed by the Commonwealth Court for hearings on objections that have been filed to nomination petitions	March 18, 2022 <i>(not later than 10 days after the last day for filing nomination petitions)</i>	March 25, 2022
Last day for candidates who filed nomination petitions to withdraw their candidacy	March 23, 2022	[no deadline change]
Last day for the Commonwealth Court to render decisions in cases involving objections to nomination petitions	March 23, 2022 <i>(not later than 15 days after the last day for filing nomination petitions)</i>	March 30, 2022 ⁸
Last day for the County Board of Elections to send remote military-overseas absentee ballots	March 28, 2022	April 2, 2022 ⁹
Last day for the County Board of Elections to send all remaining military-overseas absentee ballots	April 1/2, 2022 ¹⁰	April 2, 2022
Last day for voters to register before the primary election	May 2, 2022	[no deadline change]

⁸ Following this chart, Respondents discuss the need for this Court to modify the 10-day period for appealing from the Commonwealth Court’s decisions resolving objections to nomination petitions.

⁹ See Marks II Aff. ¶ 21. Because the deadline for sending “remote” military-overseas absentee ballots is a function of state law rather than federal law, this Court has the power to move this deadline.

¹⁰ See *supra* note 4.

Event	Current Deadline for Statewide and Congressional Elections	Proposed Modified Deadline for Statewide and Congressional Elections
Last day before the primary election to apply for a mail-in or civilian absentee ballot	May 10, 2022	[no deadline change]
Last day for County Boards of Elections to receive voted mail-in and civilian absentee ballots for the primary election	May 17, 2022	[no deadline change]
Pennsylvania’s 2022 general primary election	May 17, 2022 <i>(ten weeks between last date for circulating and filing nomination petitions and primary election)</i>	[no deadline change] <i>(nine weeks between last date for circulating and filing nomination petitions and primary election)</i>
The last day for County Boards of Elections to receive voted military-overseas ballots for the primary election for the primary election	May 24, 2022	[no deadline change]

In conjunction with this proposal, Respondents wish to address a deadline that is not listed on the chart above—namely, the deadline for parties to appeal from the Commonwealth Court’s decisions resolving objections to nomination petitions. If the Court adopts the proposal above, the Commonwealth Court decisions will be due by March 30, 2022. Under the Rules of Appellate Procedure, any person aggrieved by such decisions would then have 10 days to appeal to this Court. *See* Pa.R.A.P. 803(c)(1)(ii); *In re Morgan*, 428 A.2d 1055, 1057 (Pa. Commw. Ct. 1981).

This Court has the power to shorten this deadline. *See* Pa.R.A.P. 105(a) (an appellate court may “disregard the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction”); *see also Holt v. 2011 Legislative Reapportionment Comm’n*, 38 A.3d 711, 721 n.10 (Pa. 2012) (“as it respects the judicial function, the Election’s Code deadlines [for resolving objections to nomination petitions] are understood ... as ‘directory’” rather than mandatory). Respondents respectfully submit that the Court should do so here, and should require aggrieved parties to file any appeals within 3 days of the pertinent Commonwealth Court’s decision.

This shortened deadline is necessary and appropriate to ensure that ballots can be finalized in time for counties to send mail-in and absentee ballots to voters. Under the Election Code, counties must distribute ballots to electors who have applied for them no later than two weeks before the primary—here, May 3, 2022. *See* 25 P.S. § 3150.15. As a practical matter, however, given mail-delivery timelines and the need to process ballot applications submitted after May 3, 2022, counties will want to begin sending ballots at an earlier date. Respondents believe that, to ensure that any nomination-petition appeals can be resolved in sufficient time to finalize the mail-in and absentee ballots, the appeal period should be shortened to 3 days.

B. Proposed Modified Legislative Calendar with May 17 Primary

As the Court is aware, the Legislative Reapportionment Commission (“LRC”) adopted a Final Plan on February 4, 2022. That means that any aggrieved party has until March 7, 2022, to file an appeal. *See* PA. CONST. art. II, § 17(d); Pa.R.A.P. 903 official comment (where, as here, appeal period expires on a Sunday, any aggrieved person has until the following Monday to file an appeal). If this Court were to expedite any briefing¹¹ and argument on the appeals and enter a final ruling on the legislative Final Plan by **March 18, 2022**, the May 17 primary date could (if the Final Plan is determined to be lawful) also remain in place for the state legislative races under the proposed schedule below.

Event	Current Deadline for Legislative Election	Proposed Modified Deadline for Legislative Election
First day to circulate and file nomination petitions	February 15, 2022	March 20, 2022
Last day to circulate and file nomination petitions	March 8, 2022 <i>(three-week period for circulating and filing nomination petitions)</i>	March 29, 2022 <i>(<u>nine-day</u> period for circulating and filing nomination petitions)</i> ¹²

¹¹ This Court may wish to consider issuing an order now requiring that any brief filed in support of an appeal of the LRC’s Final Plan be submitted on or before March 8, 2022, and that the LRC file a response brief on or before March 11, 2022.

¹² In *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992) this Court ordered a nine-day nomination-petition-circulation period for congressional candidates. *See id.* at 244. Notably, candidates for state legislative office require significantly fewer petition signatures than candidates for congressional office. *Compare* 25 P.S. § 2872.1(12) (1,000 signatures required for congressional candidate), *with id.* § 2871.1(13) (500 signatures requires for candidate for

Event	Current Deadline for Legislative Election	Proposed Modified Deadline for Legislative Election
First day to circulate and file nomination papers	March 9, 2022	March 30, 2022
Last day for candidates who filed nomination petitions to withdraw their candidacy	March 23, 2022	March 31, 2022
Last day for the County Board of Elections to send remote military-overseas absentee ballots	March 28, 2022	April 2, 2022 ¹³
Last day for the County Board of Elections to send all remaining military-overseas absentee ballots	April 1/2, 2022 ¹⁴	April 2, 2022
Deadline to file objections to nomination petitions	March 15, 2022 <i>(seven-day period for filing objections to nomination petitions)</i>	April 4, 2022 <i>(six-day period for filing objections to nomination petitions)</i> ¹⁵
Last day that may be fixed by the Commonwealth Court for hearings on objections that have been filed to nomination petitions	March 18, 2022 <i>(not later than 10 days after the last day for filing nomination petitions)</i>	April 7, 2022 <i>(not later than nine days after the last day for filing the nomination petitions)</i> ¹⁶

Pennsylvania Senate), *and id.* § 2871.14 (300 signatures required for candidate for Pennsylvania House of Representatives).

¹³ See Marks II Aff. ¶ 21.

¹⁴ See *supra* note 4.

¹⁵ This Court ordered a six-day objection period in *Mellow v. Mitchell*. See 706 A.2d at 244.

¹⁶ This Court may alter the deadlines governing the Commonwealth Court’s resolution of objections to nomination petitions. See *Holt*, 38 A.3d at 721 n.10 (“as it respects the judicial function, the Election’s Code deadlines [for resolving objections to nomination petitions] are understood ... as ‘directory’” rather than mandatory); *In re Bruno*, 101 A.3d 635, 678 (Pa. 2014) (“[t]he Supreme Court’s supervisory power over the Unified Judicial System is beyond question” and includes “authority ... over inferior tribunals”).

Event	Current Deadline for Legislative Election	Proposed Modified Deadline for Legislative Election
Last day for the Commonwealth Court to render decisions in cases involving objections to nomination petitions	March 23, 2022 <i>(not later than 15 days after the last day for filing nomination petitions)</i>	April 12, 2022 <i>(not later than 14 days after the last day for filing nomination petitions)¹⁷</i>
Last day for voters to register before the primary election	May 2, 2022	[no deadline change]
Last day to apply for a mail-in or civilian absentee ballot	May 10, 2022	[no deadline change]
Last day for County Boards of Elections to receive voted mail-in and civilian absentee ballots	May 17, 2022	[no deadline change]
Pennsylvania's 2022 primary election	May 17, 2022 <i>(ten weeks between last date for circulating and filing nomination petitions and primary election)</i>	[no deadline change] <i>(seven weeks between last date for circulating and filing nomination petitions and primary election)</i>
The last day for County Boards of Elections to receive voted military-overseas ballots for the primary election for the primary election	May 24, 2022	[no deadline change]

For the reasons discussed above, *see supra* pages 9-10, Respondents respectfully request that the Court shorten to 3 days the period for appealing from the Commonwealth Court's decisions resolving objections to nomination petitions.

The Department will, of course, make every effort to comply with any schedule that the Court puts in place. To the extent the Court deems it necessary or

¹⁷ *See supra* note 16.

appropriate, Respondents stand ready to provide testimony regarding appropriate and feasible changes to the 2022 primary election calendar, and to assist the Court in determining workable alternatives to the calendars proposed above.

Respectfully submitted,

HANGLEY ARONCHICK SEGAL
PUDLIN & SCHILLER

Dated: February 14, 2022

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CERTIFICATION REGARDING PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require filing confidential information and documents differently than non-confidential information and documents.

Dated: February 14, 2022

/s/ Robert A. Wiygul
Robert A. Wiygul

IN THE SUPREME COURT OF PENNSYLVANIA

CAROL ANN CARTER; et al.,

Petitioners,

v.

LEIGH M. CHAPMAN, in her official capacity as
the Acting Secretary of the Commonwealth of Pennsylvania;
JESSICA MATHIS, in her official capacity as Director for
the Pennsylvania Bureau of Election Services and Notaries,

Respondents.

No. 7 MM 2022

PHILIP T. GRESSMAN; et al.,

Petitioners,

v.

LEIGH M. CHAPMAN, in her official capacity as
the Acting Secretary of the Commonwealth of
Pennsylvania; JESSICA MATHIS, in her official capacity
as Director for the Pennsylvania Bureau of Election
Services and Notaries,

Respondents.

AFFIDAVIT OF JONATHAN MARKS

Jonathan Marks, being duly sworn, deposes and says:

1. I am the Deputy Secretary for Elections and Commissions for the Commonwealth's Department of State (the "Department").
2. I was appointed to the position of Deputy Secretary for Elections and Commissions in February 2019.

3. I have been with the Department since 1993.

4. Prior to being appointed Deputy Secretary for Elections and Commissions in 2019, I served as Commissioner of the Bureau of Commissions, Elections and Legislation (the “Bureau”) starting in October 2011.

5. From 2008 to 2011, I served as the Chief of the Division of the Statewide Uniform Registry of Electors.

6. Prior to that, from 2004 to 2008, I served as the Chief of the Division of Elections and Precinct Data with the Bureau.

7. In my current role, I am responsible for overseeing the day-to-day operations of election administration within the Department.

8. Since I became the Commissioner of the Bureau in 2011, I have supervised the administration of the Department’s duties in more than 20 regularly-scheduled elections and over 50 special elections.

9. The next primary for all offices—statewide, congressional, and state legislative—is scheduled for May 17, 2022.

10. The current timeline of deadlines leading up to and related to the May 17, 2022 primary is as follows:

- a. The first day before the primary election to circulate and file nomination petitions is February 15, 2022. (*See* 25 P.S. § 2868.)
- b. The last day before the primary election to circulate and file

nomination petitions is March 8, 2022. (*See* 25 P.S. § 2868.)

- c. The first day before the primary election to circulate and file nomination papers is March 9, 2022. (*See* 25 P.S. § 2913(b).)
- d. The Deadline to file objections to nomination petitions is March 15, 2022. (*See* 25 P.S. § 2937.)
- e. The last day that may be fixed by the Commonwealth Court for hearings on objections that have been filed to nomination petitions is March 18, 2022. (*See* P.S. § 2937.)
- f. The last day before the primary election for candidates who filed nomination petitions to withdraw their candidacy is March 23, 2022. (*See* 25 P.S. § 2874.)
- g. The last day for the Commonwealth Court to render decisions involving objections to nomination petitions is March 23, 2022. (*See* 25 P.S. § 2937.)
- h. The last day before the primary election for the County Boards of Elections to send remote military-overseas absentee ballots is March 28, 2022. (*See* 25 Pa.C.S. § 3508(b)(1).)
- i. The last day before the primary election for the County Boards of Elections to send all remaining military-overseas absentee ballots is

April 1, 2022, under state law, *see* 25 Pa.C.S. § 3508(a)(1), and April 2, 2022, under federal law, *see* 52 U.S.C. § 20302(a)(8)(A).¹

- j. The last day before the primary election for voters to register is May 2, 2022. (*See* 25 P.S. § 3071.)
 - k. The last day before the primary election to apply for a mail-in or civilian absentee ballot is May 10, 2022. (*See* 25 P.S. § 3146.2a(a).)
 - l. The last day for County Boards of Elections to receive voted mail-in and civilian absentee ballots for the primary election is May 17, 2022. (*See* 25 P.S. § 3146.6(a).)
 - m. Pennsylvania's 2022 general primary election is scheduled for May 17, 2022. (*See* 25 P.S. § 2753(a).)
 - n. The last day for County Boards of Elections to receive voted military-overseas ballots for the primary election is May 24, 2022. (*See* 25 Pa.C.S. § 3511(a).)
11. All of the deadlines set forth above are required by federal or state law.

¹ As a practical matter, the majority of these military-overseas ballots would typically be sent out on Friday, April 1, 2022. County officials would then process any additional military-overseas ballot requests arriving on the 45th day, sending those ballots out on Saturday, April 2, 2022.

12. The current elections schedule gives the Counties ten weeks to prepare for the primary election, between (a) the last date before the primary election for circulating and filing nomination petitions (currently March 8); and (b) the primary election date (May 17).

13. Based on my experience, the Counties could fully prepare for the statewide and congressional primary election in nine weeks.

14. In order to accomplish this, the Court would need to order a time period for circulating and filing nomination petitions that lasted two weeks, instead of three; and the nominations period would need to start on March 1, spanning two weeks and ending on the recommended revised deadline of March 15.

15. Ideally, the Department and county boards of elections would have an opportunity, before the circulation and filing of nomination petitions begin, to fully update the Statewide Uniform Registry of Electors (SURE) system with information about the new districts. In that event, the computerized tool used to generate nomination petitions would allow candidates to pre-populate all the information needed on the Candidate's Affidavit, as well as the information needed in the preamble portion of the nomination petition page, based on the specific office the candidate is seeking. By contrast, with generic nomination petitions, candidates running in particular districts must manually fill in the District Number line on the Candidate's Affidavit and the District Number line and County of

Signers lines at the top of each nomination petition page. These two lines will be blank when the petition forms are generated and printed. Nonetheless, the computerized tool used to generate the generic nomination petitions will still pre-populate the rest of the information for the candidate's review.

16. The Department believes that, by using generic nomination petitions, the Department could complete its preparations for circulating and filing nomination petitions quickly and in only a couple of days, by March 1, 2022.

17. Although the use of generic nomination petitions is less than ideal, it will allow the election process to proceed in a timely manner, as necessitated under the unusual circumstances of the current election cycle.

18. If the first date for circulating and filing nomination petitions for statewide and congressional races were moved from February 15 to March 1, the Department would need to have a final congressional plan in place by no later than **February 27, 2022**.

19. The Legislative Reapportionment Commission ("LRC") adopted a Final Plan for the legislative districts on February 4, 2022. If this Court were to expedite any briefing and argument on the appeals and enter a final ruling on the legislative Final Plan by **March 18, 2022**, the May 17 primary date could (if the Final Plan is determined to be lawful) also remain in place for the state legislative races.

20. The Court would also need to order a period for circulating and filing nomination petitions that lasted nine days, instead of three weeks; and the nominations period would need to start on March 20, spanning nine days and ending on the recommended revised deadline of March 29.

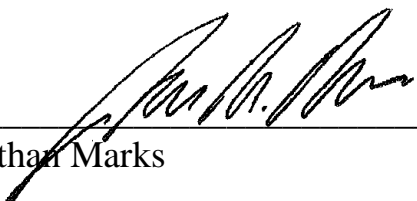
21. Finally, the Court would need to adjust the date by which the County Boards of Elections must send remote military-overseas absentee ballots from March 28, 2022 to April 2, 2022, to allow time for the Secretary to conduct the lottery to determine the position of candidate names and order in which the names will appear on the primary ballot before the remote military-overseas absentee ballots must go out. For administrative efficiencies and to align the calendars as much as possible, it would be preferable to have April 2, 2022, as the deadline for this task under the congressional calendar as well.

22. Having separate primaries would likely cause voter confusion, depress voter participation, and cost taxpayers tens of millions of dollars, and would present county election offices with significant logistical challenges, including the recruitment of poll workers.

23. Should the Court modify existing deadlines, the Department will make every effort to comply with any schedule that the Court puts in place.

The foregoing is true and correct to the best of my knowledge, information, and belief and is subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.

Date: February 14, 2022



Jonathan Marks

Exhibit E

IN THE SUPREME COURT OF PENNSYLVANIA

CAROL ANN CARTER; MONICA PARRILLA;
REBECCA POYOUROW; WILLIAM TUNG; ROSEANNE
MILAZZO; BURT SIEGEL; SUSAN CASSANELLI; LEE
CASSANELLI; LYNN WACHMAN; MICHAEL
GUTTMAN; MAYA FONKEU; BRADY HILL; MARY
ELLEN BALCHUNIS; TOM DEWALL; STEPHANIE
MCNULTY; and JANET TEMIN,

Petitioners,

v.

LEIGH M. CHAPMAN, in her official capacity as the Acting
Secretary of the Commonwealth of Pennsylvania; JESSICA
MATHIS, in her official capacity as Director for the
Pennsylvania Bureau of Election Services and Notaries,

Respondents.

No. 7 MM 2022

PHILIP T. GRESSMAN; RON Y. DONAGI; KRISTOPHER
R. TAPP; PAMELA GORKIN; DAVID P. MARSH; JAMES
L. ROSENBERGER; AMY MYERS; EUGENE BOMAN;
GARY GORDON; LIZ MCMAHON; TIMOTHY G.
FEEMAN; and GARTH ISAAK,

Petitioners,

v.

LEIGH M. CHAPMAN, in her official capacity as the Acting
Secretary of the Commonwealth of Pennsylvania; JESSICA
MATHIS, in her official capacity as Director for the
Pennsylvania Bureau of Election Services and Notaries,

Respondents.

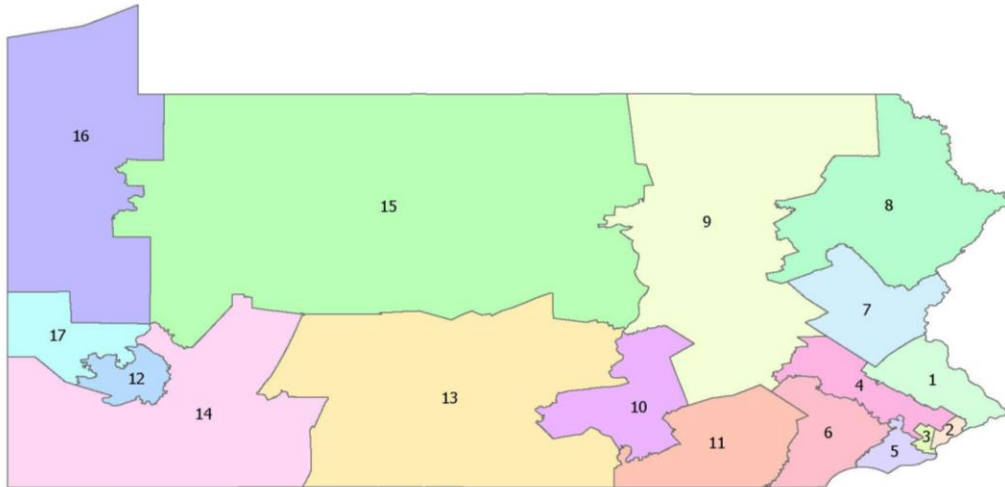
DECLARATION OF JONATHAN RODDEN, Ph.D.

1. I, Jonathan Rodden, am an adult individual over the age of eighteen (18) and competent to testify as to the matters set forth below.
2. On January 24, 2022, I produced to the Commonwealth Court a congressional redistricting plan (the “Carter Plan”), which I created as described in my initial expert report.
3. On February 7, 2022, counsel for the *Carter* Petitioners asked me to revise the Carter Plan solely to further equalize population across districts and achieve no more than a one-person population deviation where possible.
4. In the previous Carter Plan, I had allowed districts to be either exactly at the target population (4 districts), one person over (4 districts), or one person under (9 districts). In the revised plan, I no longer allow any districts to be one person over. In the revised plan, 12 districts are exactly at the target population and 5 districts are one person below.
5. To do this, I revisited each location along each border where I had either worked with a specific combination of Vote Tabulation Districts (“VTD”) or split a single VTD to equalize population across districts. In most cases, I split the same VTD, but used a slightly different arrangement of census blocks in order to make the requisite one-person change in district population. In one location, due to coarseness in the sizes of blocks that

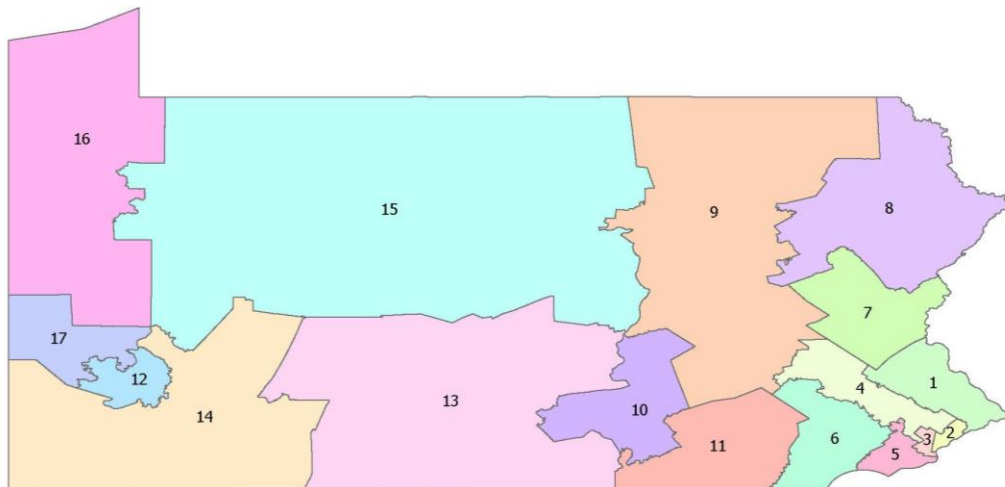
prevented me from achieving the target population total using the blocks in the VTD I had initially split, I split a *different* adjoining VTD, keeping whole the VTD that had been split in the initial Carter Plan. In other words, I did not split an additional VTD, but rather, split an alternative adjoining VTD.

6. In one location, the intersection of Districts 3 and 5 in South Philadelphia, I had been able to avoid splitting any VTDs in the initial Carter Plan. This was no longer possible in my pursuit to achieve zero population deviation, so I had to split an additional VTD in order to achieve zero population deviation between these two districts.
7. Other than this additional VTD split in South Philadelphia, these changes that I made to minimize population deviation do not affect the plan-wide metrics reported for the Carter Plan in the expert submissions I made on January 24 and 26 or in my Commonwealth Court testimony on January 27. In other words, the only change to the reported metrics is an increase in the number of VTD splits, from 14 to 15.

8. The following map depicts the Carter Plan, for which a block equivalency file and shape file were submitted to the Commonwealth Court on January 24, 2022.



9. The following map depicts my revised congressional plan (the “Carter Revised Plan”), for which a block equivalency file and shape file are available to download at <https://ballardspahr.sharefile.com/d-s028ac6af696b4e0ea9122cc758dd4855>.



10. I declare under the penalty of perjury that the foregoing is true and correct.

The statements contained in this Declaration are made subject to the penalties of 18 Pa. C.S. § 4904, relating to unsworn falsification to authorities.



Executed on February 14, 2022

Jonathan Rodden

Exhibit F

EXPERT REPORT OF JONATHAN RODDEN, Ph.D.

***Carter v. Chapman*, 464 MD 2021, 465 MD 2021 (Pa. Commw. Ct.)**

January 26, 2022

In this report, I provide a brief analysis of a set of 13 Pennsylvania congressional redistricting plans that were provided to me on January 24. I have been asked to provide a basic analysis of these plans, and to compare them with a redistricting plan, called the “Carter Plan,” that I submitted in this case on January 24. Please see my previous report for a discussion of my qualifications and relevant experience.

First, I assess the extent to which these plans place voters in different districts than those of the 2018 Remedial Plan ordered by the Pennsylvania Supreme Court four years ago. Second, I assess these plans according to several traditional redistricting criteria, including population equality, contiguity, compactness, and splits of counties, county subdivisions, and vote tabulation districts. Third, I assess the likely partisan outcomes associated with these plans.

I. DEVIATION FROM THE PREVIOUS REDISTRICTING PLAN

In the expert report I submitted in this case on January 24, I explained that the Carter Plan was explicitly crafted to minimize the changes from the 2018 Remedial Plan, which had only been in place for two elections. This choice was made because the Pennsylvania Supreme Court had very recently endorsed this plan as meeting all its objective criteria.

I measured the extent to which each of the submitted plans places voters in the same district as in the previous 2018 plan. Note that some district numbers have changed. For each district in each submitted plan, the task is to find the overlapping fragments of districts from the previous plan and identify the largest one. I then calculate the share of all voters in the proposed new district living in that largest fragment. For instance, since Bucks County is in the corner of the state and has a population relatively close to the required population for a congressional district, most map-drawers drew a district that was dominated by Bucks County, adding in some municipalities on the Western or Southern edge of the district in Montgomery or Philadelphia, just as the previous plan had done. For this Bucks County-oriented district, many of the plans had what I will call a “retained population share” of over 90 percent. However, as explained in my earlier report, these shares were necessarily much lower in Central Pennsylvania in all the plans, because rural population loss required more substantial changes.

Some of the plans also introduced major changes in metro areas. For instance, while the 2018 Remedial Plan plan kept the city of Pittsburgh whole, some plans, including the Governor’s plan, opted to split it. The plan introduced in HB2146 pursues a different orientation of the Pittsburgh area altogether, adding a number of more rural, Republican communities to what was previously a very competitive but Republican-leaning district.

I have calculated the average “retained population share” across all the districts in each plan, and I report this quantity in Table 1.

Table 1: Retained Population Share in 14 Submitted PA Congressional Plans

Plan	Retained Population Share
Carter	86.6
CCFD	76.1
Citizen Voters	82.4
HB2146	78.5
Draw the Lines PA	78.8
GMS	72.8
Governor Wolf	81.2
Ali	81.5
PA House Dem. Caucus	73.3
Resenthaler 1	76.5
Resenthaler 2	76.5
Senate Dem. Plan 1	72.5
Senate Dem. Plan 2	72.5
Voters of PA	80.6

Not surprisingly, since the Carter Plan explicitly set out to minimize boundary changes, its districts retain more of their former population—around 87 percent—than any of the submitted plans. The plans that make the largest changes are the Senate Democratic plans, the GMS plan, and the House Democratic Caucus plan.

II. TRADITIONAL REDISTRICTING CRITERIA

Population Equality

The ideal population for a Pennsylvania Congressional District in the 2022 round of redistricting is 764,865. Each of the maps, including the Carter Plan, creates 17 districts where the population, according to the 2020 Census, is either precisely that number, one more, or one less. The only exception is the map submitted by Khalif Ali, where the districts were drawn using the Legislative Reapportionment Commission’s Data Set #2, which contains population adjustments to account for the reallocation of most prisoners to their last known address prior to incarceration. When analyzed using the Census data or Legislative Reapportionment Commission’s Data Set #1, the Ali map results in districts that have population deviations of up to several thousand people. But it purports to be equally populated under Data Set #2, and I did not analyze its population equality under that data set.

Given ongoing residential moves, measurement error, and the efforts of the census department to protect privacy, deviations of zero or a single voter from “perfect” equality are a form of what is commonly referred to as “false precision.” Given measurement error and population churn, even plans with zero population deviation in every district are unlikely to be *truly* equal in population.

The best we can say is that in each of these plans, populations are as close to equal as is possible given the constraints of the data.

Contiguity

Each of the maps, including the Carter Plan, has districts made up of contiguous territory. The only potential exception is the CCFD map, which includes a zero-population noncontiguous census block in District 9.

Compactness

All the maps I received include relatively compact districts. There is no widely accepted “best” measure of compactness, and each measure achieves something different. Two measures of compactness often considered by courts are the Polsby-Popper score and the Reock score. The Polsby-Popper score is the ratio of the area of the district to the area of a circle whose circumference is equal to the perimeter of the district. This score rewards districts with smooth perimeters and penalizes those with more contorted borders. To the extent that jagged borders are sometimes caused by natural features, like rivers separating counties, coastlines, or boundaries of cities that have experienced odd-shaped annexations over the years, the Polsby-Popper score might serve as a rather poor indicator of political manipulation. If one map-drawer chooses to keep an odd-shaped city whole, and another elects to split the city cleanly down the middle, the first map-drawer will end up with a district with a lower Polsby-Popper score. Likewise, if one district-drawer chooses to keep a county whole—but the county’s boundary is a meandering river—this district will have a lower Polsby-Popper score than that of another district-drawer who chooses to split the county along a smooth municipal boundary.

The Reock score is computed by dividing the area of the district by the area of the smallest circle that would completely enclose it. The downside of this measure is that it can be sensitive to the orientations of a district’s extremities. A rather odd-shaped district, for example one resembling a coiled snake, might still end up with a low Reock score if its stays nicely within the bounding circle. Fortunately, the districts submitted to the Court are not rife with such odd-shaped districts.

In general, the compactness scores all fall within a relatively narrow range. None of the submitted plans features highly non-compact districts with tentacles, claws, and the like.

Splits of Jurisdictions

Some maps- are more successful than others in keeping political subdivisions whole. Table 1 provides information about county splits in the submitted plans. It makes a subtle distinction between the number of split counties and the total number of county splits. The number of split counties is, quite simply, the number of counties that were not kept whole, regardless of how many splits they experienced. However, some counties were split multiple times. Many of the maps, for instance, split Philadelphia, Montgomery, or Berks County among three rather than just two districts. And some of the plans extracted separate chunks of the same county in different regions of the county. The last column in Table 1 adds up the *total* number of splits, such that a county

split between three districts counts as two splits rather than one, and two non-contiguous splits of the same county are both counted.

**Table 2:
County Splits in 14 Submitted Congressional Plans**

Plan	Number of Split Counties	Total County Splits
Carter	14	17
CCFD	16	20
Citizen Voters	14	17
HB2146	15	20
Draw the Lines PA	14	18
GMS	15	19
Governor Wolf	16	22
Ali	16	20
PA House Dem. Caucus	16	18
Resenthaler 1	13	18
Resenthaler 2	13	18
Senate Dem. Plan 1	17	20
Senate Dem. Plan 2	16	18
Voters of PA	15	17

The two Resenthaler plans split 13 counties, while the Carter, Citizen Voters, and Draw the Lines PA plans split 14. Note that in my previous report, I adopted the Pennsylvania Supreme Court’s logic, arguing that the Carter Plan’s split of only 6 people in order to preserve contiguity while avoiding a split of Chester County should not be counted, and the true number of split counties in the Carter Plan is actually 13 instead of 14. However, since I have not had the opportunity to assess such technicalities in each of the 13 other plans, Table 2 counts even these tiniest splits wherever they occur. The largest number of split counties, 17, is found in Senate Democratic Plan 1. However, if we focus on *total* splits, the Carter Plan, Citizen Voters Plan, and Voters of PA plans demonstrate the lowest number of splits, 17, and the Governor’s Plan demonstrates the largest number of splits, 22.

One might imagine that a low number of split counties goes hand in hand with higher levels of compactness, but for reasons described above, this is not necessarily the case. Figure 1 plots the Reock Score against the total number of county splits in each plan. There is only a weak negative relationship. Figure 1 shows that the “Voters of Pennsylvania” plan and the Carter Plan are the most compact, according to the Reock Score, and have the lowest number of total county splits.

Figure 1: Reock Compactness Score and Total County Splits, 14 Submitted Plans

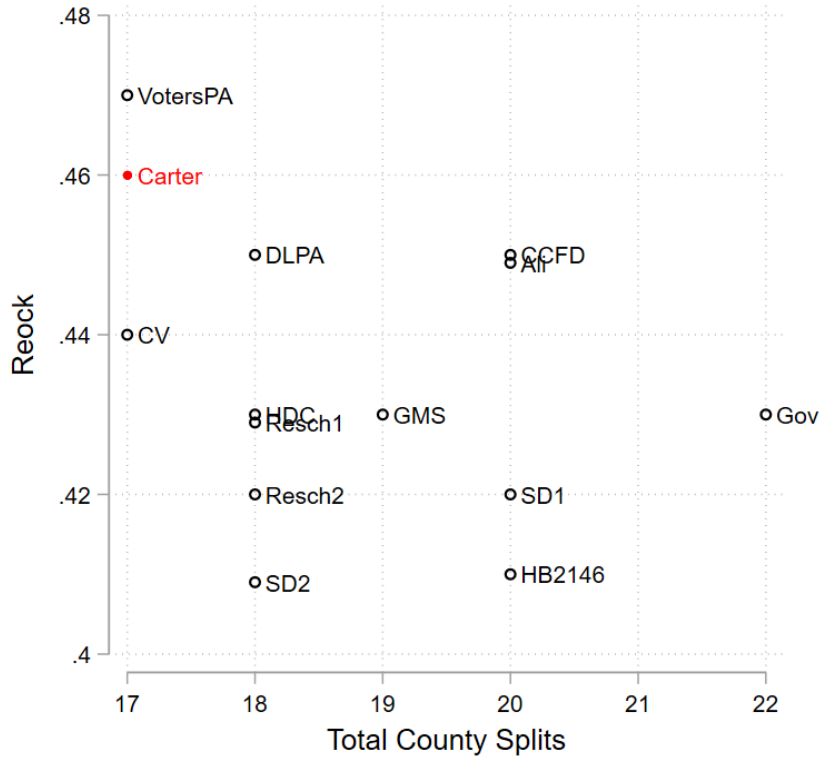


Table 3 examines splits in the boundaries of County subdivisions, using geo-spatial boundaries curated by the U.S. Census Department. The Carter Plan splits 20 such subdivisions, while the lowest number of subdivisions splits is demonstrated by the CCFD Plan, with 14. When it comes to *total* County Subdivision splits, the Carter Plan is in the middle of the distribution across plans.

Table 3: County Subdivision Splits in 14 Submitted Congressional Plans

Plan	Number of Split County Subdivisions	Total County Subdivision Splits
Carter	20	23
CCFD	14	18
Citizen Voters	16	21
HB2146	16	25
Draw the Lines PA	16	23
GMS	16	26
Governor Wolf	17	35
Ali	18	24
PA House Dem. Caucus	18	20
Resenthaler 1	15	22
Resenthaler 2	15	22
Senate Dem. Plan 1	19	22
Senate Dem. Plan 2	16	18
Voters of PA	18	26

In the world of election administration, it is especially useful to avoid splitting vote tabulation districts (VTDs). Above all, split VTDs can lead to mistakes for local election administrators, who must be sure to provide the right ballot for residents living in two different political districts, even though they might be voting at the same polling place. However, when a redistricting plan is aiming to seek population equality within a very narrow allowable deviation, like plus or minus one person, it is often not possible to avoid splitting a VTD somewhere along the boundary of two districts, since the VTD populations simply do not add to precisely the right numbers. Nevertheless, it is possible to minimize these splits. Table 4 provides the number of VTDs that were split by each plan.

Table 4: Split Vote Tabulation Districts in 14 Submitted PA Congressional Plans

Plan	Number of Split VTDs
Carter	14
CCFD	16
Citizen Voters	26
HB2146	9
Draw the Lines PA	23
GMS	17
Governor Wolf	17
Ali	27
PA House Dem. Caucus	16
Resenthaler 1	31
Resenthaler 2	31
Senate Dem. Plan 1	16
Senate Dem. Plan 2	16
Voters of PA	16

The two plans with the lowest number of split VTDs are HB2146 and the Carter Plan. The plans with the most split VTDs are the Resenthaler plans and the Ali Plan.

III. PARTISAN FAIRNESS AND COMPETITION

A final task is to assess whether the plans are fair to both political parties. As explained in my initial report submitted in this case, if we look at statewide elections in recent years, around 52 to 53 percent of votes for the two major parties go to Democrats. The 2018 Remedial Plan had 18 districts, and the Congressional delegation was evenly split, 9 to 9. Given the overall statewide vote share, this map gave a slight advantage in practice to the Republican Party, though as pointed out in my earlier report, it is important not to be misled by simple seat counts without a closer look at the underlying partisanship of districts and the role of incumbency. Several districts in the previous plan were relatively balanced, both in terms of statewide partisanship and actual congressional elections, and one district—District 1 in Bucks County—leaned toward Democratic candidates in statewide races but consistently elected a Republican Congressional representative.

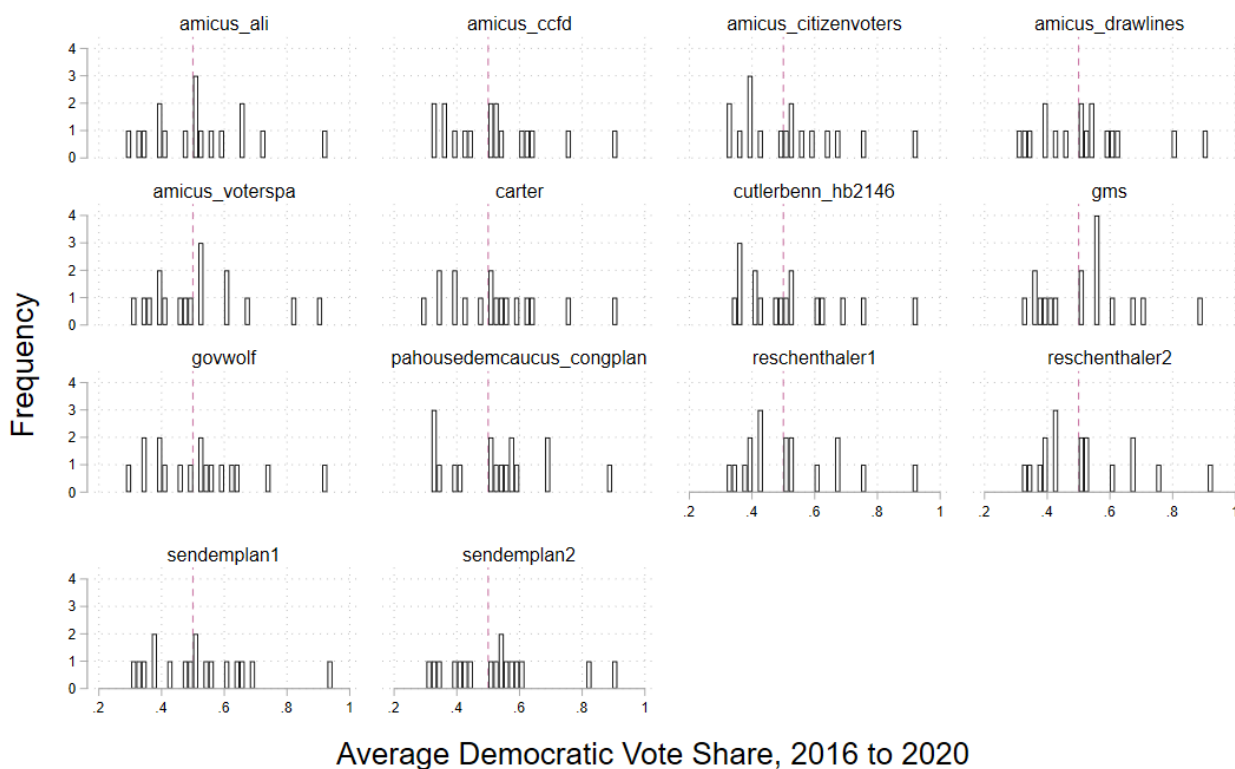
Now there is an odd number of districts, so a tied delegation is no longer possible. Given the Democrats' advantage in the statewide vote share, one would anticipate that the Democratic Party would be able to win a majority of congressional seats as well, especially since, as detailed in my previous report, population has been declining in Republican areas and increasing in Democratic areas, with Democratic support also *growing* in the areas that are gaining population.

As I have described elsewhere,¹ Pennsylvania's political geography is such that at the scale of congressional districts, Democratic and Republican areas are in sufficient proximity to one another—above all, along the Eastern side of the state and in the Pittsburgh suburbs—that it should also be possible to sustain some competitive districts that will change hands between the parties as voters' preferences change.

To examine partisanship, as in my previous report, I have aggregated the precinct-level votes for the two parties in all the statewide elections from 2016 to 2020 and calculated the average share of the vote for each of the two major parties in each district. A good way to visualize the result of this exercise is with Figure 2, which provides histograms of the Democratic vote share across districts for each plan. The 50 percent point is indicated with a dashed red line. On the left-hand side of the line are districts that Republicans can anticipate winning, and on the right-hand side are the districts that Democrats can expect to win. When the bars are higher, this indicates that there are multiple districts in that bin. The height of the bin corresponds to the number of districts in that bin. For instance, we can see that the Ali Plan has three districts that are very close to evenly divided between the parties. We also can see that all the plans have exceptionally Democratic districts on the right-hand side of the graph because most of them keep the very Democratic neighborhoods of Philadelphia together.

¹ Jonathan Rodden, *Why Cities Lose: The Deep Roots of the Urban-Rural Political Divide*. New York: Basic Books.

**Figure 2:
The Distribution of Partisanship Across Districts of 14 Submitted Congressional Plans**



Graphs by plan

One way to use the data in Figure 2 is to simply add up the districts that are on either side of the red line. How many districts have Democratic majorities in these statewide races, however small, and how many have Republican majorities?

If we are interested in competitive districts, we can also ask how many seats are in the bins closest to the red lines in Figure 2. I have calculated the number of seats in each plan between 50 percent Democratic and 52 percent Democratic, and those between 50 percent Republican and 52 percent Republican, using statewide elections from 2016 to 2020. This information is set forth in Table 5 below.

Table 5: Number of Seats in Various Categories, 14 Submitted Congressional Plans

Plan	# of seats with statewide Dem vote share >.5	# of seats with statewide Dem vote share >.52	# of seats with statewide Dem vote share between .5 and .52	# of seats with statewide Rep vote share between .5 and .52	# of seats with statewide Rep vote share >.52	# of seats with statewide Dem vote share >.5
Ali	10	7	3	0	7	7
CCFD	10	8	2	0	7	7
Citizen Voters	9	8	1	1	7	8
Draw the Lines PA	10	8	2	0	7	7
Voters of PA	8	8	0	2	7	9
Carter	10	8	2	0	7	7
HB2146	8	7	1	2	7	9
GMS	10	8	2	0	7	7
Governor Wolf	9	9	0	1	7	8
PA House Dem. Caucus	11	9	2	0	6	6
Resenthaler 1	9	6	3	0	8	8
Resenthaler 2	9	7	2	0	8	8
Senate Dem. Plan 1	9	7	2	1	7	8
Senate Dem. Plan 2	10	9	1	0	7	7

In most of the plans, either 9 or 10 seats have average Democratic vote shares above 50 percent (see the first column in Table 5). However, one can look at Figure 2 above, or at the middle columns in Table 5, to see that typically, anywhere from one to three of the nominally Democratic districts are very close to 50 percent. In the Carter Plan, two of the Democratic-leaning districts, as determined by statewide elections, are in this category. These are usually in the Lehigh Valley, the Northeast, and/or suburban Pittsburgh. In other words, by no means does this analysis tell us the Democrats will win 10 seats in, for instance, the GMS plan. Figure 2 and Table 5 tell us that two of the districts in this plan are essentially toss-ups based on the statewide data.

In the Carter Plan, there are 10 Democratic-leaning districts, but two of them are very close to toss-ups, yet there are no Republican-leaning toss-ups. Thus, based purely on statewide election data, the Carter Plan could easily lead to a 9-8 Republican majority.

However, as I explained in my earlier report, the statewide analysis in Table 5 is potentially quite flawed. I pointed out that the Republican incumbent in Bucks County, Brian Fitzpatrick, typically outperforms his party by over 7 percentage points. As mentioned above, the Bucks County district experiences very little change in all these plans. As a result, all these plans include a district with a statewide Democratic vote share above 50 percent where the Republican incumbent is very likely to win. In fact, in many of these plans, including the Carter Plan, Table 5 categorizes the district

in which Rep. Fitzpatrick wins by large margins as a relatively comfortable *Republican* district. In other words, if the goal of the first column of Table 5 is to predict Democratic wins, one seat should be moved from the far-left Democratic column in Table 5 to the far-right Republican column. The anticipated number of Democratic seats in the Carter Plan, for example, is 9, not 10 if we consider this important fact.

Three plans are outliers: First, HB2146 and the “Voters of PA” plan both produce a minority of Democratic-leaning seats in spite of the Democrats’ overall statewide majorities during this period. This is especially noteworthy if we account for the incumbent in the Bucks County-based district and recognize that these plans are likely to produce only 7 Democratic seats (i.e. 41 percent of the seats in a state where Democrats get more than 52 percent of the vote).

The Reschenthaler 1 and Reschenthaler 2 plans also stand out, in that they produce 8 comfortable Republican seats, not including Rep. Fitzpatrick’s seat, and an unusually low number of comfortable Democratic seats, achieving a nominal, and potentially misleading, total of 9 Democratic-leaning seats by producing either 2 or 3 toss-up seats that lean Democratic.

The Senate Democratic Plan Number 1, too, produces fewer comfortable Democratic seats than almost every other plan.

In the other direction, the Pennsylvania House Democratic Caucus is an outlier in that it is the only plan with 11 seats above the 50 percent Democratic threshold. Governor Wolf’s Plan, as well as the Senate Democratic Plan Number 2 are unusual in that they produce only 1 district in the 50 to 52 percent range for either political party.

The HB2146 and “Voters of PA” plans, as well as the Reschenthaler plans, also stand out in another respect. Using the 2016 to 2020 statewide average, I have calculated the mean Democratic vote share across all the districts in each plan, as well as the median Democratic vote share in each plan. The mean and median are almost identical in all the plans, with the exception of these three. In HB2146, the average Democratic vote share is higher by 2.4 percentage points than the median Democratic vote share. In the “Voters of PA” plan, it is higher by 2.6 percentage points. In the Reschenthaler plans, the difference is 1 percentage point. This simple statistic captures the fact—also evident in Figure 2 above, that the distribution of Democratic vote shares across districts is unusually skewed in these plans. Democrats are quite concentrated in districts that they win with large majorities, in the right tail of the distributions depicted in Figure 2, and there is a large density of districts that Republicans win by comfortable, but not overwhelming, majorities, to the left of the red lines in Figure 2. This results in a mean Democratic vote share that is higher than the median. We do not see a similar skew in the cross-district distributions for any of the other plans.

Table 6: Mean-Median Difference for 14 Submitted Congressional Plans.

Plan	<u>Mean Median Difference</u>
Ali	0.004
Carter	0.005
CCFD	0.005
Citizen Voters	0.014
Draw the lines	0.006
GMS	0.005
Gov. Wolf	0.006
HB2146	0.024
HDC	0.004
Resenthaler 1	0.01
Resenthaler 2	0.01
Sen Dems 1	0.007
Sen Dems 2	0.007
Voters of PA	0.026

IV. CONCLUSION

The 14 plans reviewed in this report are in a relatively narrow band when it comes to population equality, county, county subdivision, and vote tabulation district splits, as well as compactness. The Carter Plan was more faithful than the others to the original 2018 districts and preserved more of the population of these districts within the proposed new districts. It also ranks at or near the top of the plans in terms of county and VTD splits, and the Reock compactness score.

Most of the plans produce either 9 or 10 districts in which Democratic statewide candidates have received majorities in recent years. The Carter Plan produces 10. It should be noted, however, that in most of these plans, including the Carter Plan, one of those districts is quite likely to be won by a Republican incumbent, so that the most likely outcome is 8 or 9 Democratic members of Congress. Two plans, the HB2146 plan and the “Voters of PA” Plan, are clearly more favorable to Republican candidates, and would likely lead to counter-majoritarian outcomes. Another plan, produced by the House Democratic Caucus, is unusually advantageous to the Democratic Party.

Ultimately, when one considers only those plans that accurately reflect Pennsylvanians’ statewide voter preferences, then the Carter Plan does best (or ties for best) on the Reock compactness score, county splits, and VTD splits and retains the most voters in their 2018 districts.

I hereby certify that the foregoing statements are true and correct to the best of my knowledge, information, and belief. This verification is made subject to the penalties of 18 Pa.C.S. § 4904 relating to unsworn falsification to authorities.



Jonathan Rodden

January 26, 2022